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No. 14401

**United States
Court of Appeals**
for the Ninth Circuit

VICTOR G. LANDS,

Appellant,

vs.

KYLE Z. GRAINGER, JR., Trustee in Bankruptcy
of Estate of Universal Produce Company,
Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

FILED

AUG 31 1954

PAUL P. O'BRIEN

No. 14401

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 48, Calif.

For Appellee:

QUITTNER and STUTMAN,
GEORGE M. TREISTER,
Suite 1125,
639 S. Spring St.,
Los Angeles 14, Calif.

In the United States District Court, Southern
District of California Southern Division

No. 3433

In the Matter of

UNIVERSAL PRODUCE COMPANY,
a California Corporation,
Alleged Bankrupt.

PETITION FOR INVOLUNTARY
BANKRUPTCY

To the Honorable Judges of the United States Dis-
trict Court, Southern District of California,
Southern Division:

The petition of Walter Verhelen Co., a co-partner-
ship, consisting of Walter Verhelen and Walter Ver-
helen, II; Riley Atkinson & Co., an Idaho corpora-
tion; and F. H. Woodruff & Sons, Inc., a corpora-
tion doing business in California, respectfully
represents:

I.

That Universal Produce Company, a California
corporation, has had its principal place of business at
541 J. Street, San Diego, California, within the above
judicial district, for a longer portion of the six (6)
months immediately preceding the filing of this
petition than in any other judicial district; and owes
debts to the amount of One Thousand Dollars (\$1,-
000.00) or more; and is not a municipal railroad,
insurance or banking corporation, or a building and

loan association, but is engaged in the commission brokerage and merchandising business. [2*]

II.

Your petitioners are creditors of the said Universal Produce Company, a California corporation, having provable and unsecured claims against it, liquidated as to amount and not contingent as to liability, amounting in the aggregate to Five Hundred Dollars (\$500.00) or over, in excess of securities.

III.

That the nature and amounts of your petitioners' claims are as follows:

a. The claim of your petitioner, Walter Verhelen Co., a copartnership, consisting of Walter Verhelen and Walter Verhelen, II, is in the amount of Four Thousand Three Hundred Ninety-seven and eighty one/hundredths Dollars (\$4,397.80), for goods, wares and merchandise furnished by it to the said Universal Produce Company, a California corporation.

b. The claim of your petitioner, F. H. Woodruff & Sons, Inc., a corporation, doing business in California, is in the amount of Nine Thousand Four Hundred Fifty-one and nine one/hundredths Dollars (\$9,451.09), for goods, wares and merchandise furnished by it to the said Universal Produce Company, a California corporation.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

c. The claim of your petitioner, Riley Atkinson & Co., an Idaho corporation, is in the amount of Eight Thousand Forty-two and fifty-nine one/hundredths Dollars (\$8,042.59), for goods, wares and merchandise furnished by it to the said Universal Produce Company, a California corporation.

IV.

That within four months next preceding the filing of this petition, the said alleged bankrupt on December 3, 1952, and December 12, 1952, respectively, concealed, removed or permitted to be concealed or removed a portion of its property, to wit, the sum of \$10,000.00 with intent to hinder, delay or defraud its creditors or any of them, or made or suffered a transfer of its [3] property, to wit, the sum of \$10,000.00 on December 3, 1952, and December 12, 1952, to Victor G. Lands, which transaction is fraudulent under the provisions of Section 67 and Section 70 of the Bankruptcy Act.

That within four months next preceding the filing of this petition, the said alleged bankrupt on December 3, 1952, and December 12, 1952, respectively, transferred, while insolvent, a portion of its property to wit, the sum of \$10,000.00 to Victor G. Lands, with intent to prefer the said Victor G. Lands over its other creditors, or made or suffered a preferential transfer to the said Victor G. Lands, as defined in subdivision (a) of Section 60 of this Act.

Wherefore, your petitioners pray that service of this petition with a subpoena may be made upon

said Universal Produce Company, a California corporation, as provided in the Bankruptcy Act, and that it may be adjudged by the Court to be a bankrupt within the purview of the said Act.

WALTER VERHELEN CO.,
A Co-Partnership, consisting of Walter Verhelen
and Walter Verhelen, II;

By /s/ SAMUEL S. BLOOM,
Agent and Attorney-in-Fact;

RILEY ATKINSON & CO.,
An Idaho Corporation;

By /s/ SAMUEL S. BLOOM,
Agent and Attorney-in-Fact;

F. H. WOODRUFF & SONS,
INC.,
A Corporation, Doing
Business in California;

By /s/ SAMUEL S. BLOOM,
Agent and Attorney-in-Fact.

QUITTNER & STUTMAN,
By /s/ WILLIAM J. TIERNAN,
Attorneys for Petitioning
Creditors.

Duly verified.

[Endorsed]: Filed January 16, 1953. [4]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 1st day of May, 1953;

Whereas, a petition was filed in this court on the 16th day of January, 1953, against Universal Produce Company, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Reuben G. Hunt, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Universal Produce Company shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

May 1st, 1953.

/s/ BEN HARRISON,
District Judge.

[Endorsed]: Filed May 1, 1953. [6]

[Title of District Court and Cause.]

PETITION TO RECLAIM PROPERTY

To Edward T. Lannon, Esq., Referee in Bankruptcy.

The petition of Victor G. Lands respectfully represents:

I.

On or about the 16th day of January, 1953, a petition in involuntary bankruptcy was filed against the above-named alleged bankrupt.

II.

John R. Hellen is the duly appointed, qualified and acting receiver of the property of the above-named alleged bankrupt.

III.

Said receiver has in his possession the following described property, belonging to your petitioner:

\$10,000.00 in cash which said receiver obtained from the firm of Yeckes-Eichenbaum of New York City, New York, as partial payment for certain railroad cars of peas grown in Mexico by the above-named alleged bankrupt and shipped by it to said firm. [7]

IV.

Petitioner is the owner and is entitled to immediate possession of the said \$10,000 in cash.

V.

On or about the 6th day of February, 1953, petitioner duly demanded from said receiver the sur-

render to petitioner of said property and said receiver has failed and refused and still fails and refuses to surrender the same and to comply with said demand.

Wherefore, petitioner prays that said receiver, John R. Hellen, be directed to surrender possession of said property, to wit, the said \$10,000 in cash, to petitioner, and that your petitioner have such other and further relief as is just and proper.

/s/ VICTOR G. LANDS,
Petitioner.

/s/ VIVIAN M. FELD,
Attorney for Petitioner.

[Endorsed]: Filed March 9, 1953, Referee. [8]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
RE PREFERENCE AND FRAUDULENT
CONVERSION

Comes now your petitioner, Kyle Z. Grainger, Jr., and respectfully represents and shows the Referee:

I.

Your Petitioner is the duly appointed, qualified and acting Trustee of the above-entitled bankrupt estate.

II.

The Respondent, Victor G. Lands, was at all times mentioned herein and at all times material, an of-

ficer, director and shareholder of the bankrupt corporation.

III.

In October, 1952, Respondent Victor G. Lands, loaned to the bankrupt corporation the sum of \$20,000.00 on an unsecured basis and became thereby a creditor of the bankrupt corporation.

IV.

The said Victor G. Lands has filed in the within bankruptcy a petition to reclaim property, alleging that he is the owner of a quantity of cash which is the property of this estate. [9]

Subsequent to the loan of the \$20,000.00 as aforesaid, the Respondent, Victor G. Lands, transferred or caused to be transferred to himself on December 3, 1952, the sum of \$5,000.00, and on December 12, 1952, a further sum of \$5,000.00, or a total sum of \$10,000. The moneys were transferred by check drawn by Victor G. Lands on the corporation bank account. Your petitioner alleges that these transfers of funds constituted a preference to the said Victor G. Lands under Section 60a of the Bankruptcy Act.

VI.

Petitioner alleges that in addition to the sum of \$10,000.00 as aforesaid, the said Victor G. Lands transferred other and additional sums to himself and made further transfers of property of the corporation to himself and that the said transfers and conveyances constituted preferences under Section 60a of the Bankruptcy Act.

Second Claim

I.

Petitioner repeats and realleges paragraphs I, II, III, and IV of the first claim and makes them a part of the second claim as though fully set forth herein.

II.

Petitioner alleges that on or about December 3, 1952, Respondent Victor G. Lands, transferred the sum of \$5,000.00 of the bankrupt's funds to himself; that on or about December 12, 1952, said Victor G. Lands transferred an additional \$5,000.00 and thereafter other portions of the bankrupt's funds and properties to himself on other occasions.

III.

Petitioner alleges that there was no consideration paid to the bankrupt corporation at the time of these transfers and conveyances and the said transfers and conveyances were made at a time when the corporation was solvent or as a result of these [10] said transfers and conveyances would be rendered insolvent or unable to pay its debts as they matured.

IV.

Petitioner alleges that the true and exact financial condition of the company was well-known to the Respondent Victor G. Lands and that the said transfers and conveyances were and are fraudulent as against the creditors of this estate and this petitioner as Trustee herein elects to void the said transfers and conveyances.

Wherefore, petitioner prays that this Court issue

its Order to Show Cause upon reading and filing this Petition, requiring the said Victor G. Lands to come into court at a time and place then and there to show cause, if any he has, why an Order should not be made ordering and directing him to forthwith turn over to your petitioner the sum of \$10,000.00 and any other sums so transferred, in accordance with the election of the petitioner, together with interest on said sums as allowed by law.

/s/ KYLE Z. GRAINGER, JR.,
Trustee.

QUITTNER AND STUTMAN,

By /s/ WILLIAM J. TIERNAN.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 3, 1953, Referee. [11]

[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDER TO
SHOW CAUSE RE PREFERENCE AND
FRAUDULENT CONVERSION

Comes now the respondent, Victor G. Lands, and in answer to the petition of Kyle Z. Grainger, Jr., admits, denies and alleges as follows:

Answer to First Claim

I.

In answer to Paragraph III, respondent admits that in October, 1952, he loaned to the bankrupt cor-

poration the sum of \$20,000 and thereby became a creditor of said corporation. Except as expressly admitted, respondent denies generally and specifically each and every, all and singular, the allegations contained in said paragraph; denies that he made said loan on an unsecured basis.

II.

In answer to Paragraph IV, respondent admits that he had filed a petition to reclaim property alleging that he is the owner of a quantity of cash which is being held by the trustee of said bankrupt estate; denies that said cash is the property of this [13] estate.

III.

In answer to Paragraph V, respondent admits that \$10,000 of said loan of \$20,000 has been repaid to him. Except as expressly admitted, respondent denies generally and specifically each and every, all and singular, the allegations contained in said Paragraph V.

IV.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph VI.

Answer to Second Claim

I.

Respondent refers to Paragraphs I and II of his answer to first claim, makes them a part hereof and incorporates them herein as though fully set out at length herein in answer to Paragraph I.

II.

In answer to Paragraph II, respondent admits that in December, 1952, he was repaid the sum of \$10,000. Except as expressly admitted, respondent denies generally and specifically each and every, all and singular, the allegations contained in said paragraph.

III.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph III.

IV.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph IV.

Wherefore, respondent prays that petitioner take nothing by his petition and for such other and further relief as to the court may seem proper.

/s/ VIVIAN M. FELD,

Attorney for Respondent.

/s/ VICTOR G. LANDS,

Respondent.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1953, Referee. [14]

[Title of District Court and Cause.]

ANSWER TO PETITION TO
RECLAIM PROPERTY

Comes Now Kyle Z. Grainger, Jr., Trustee, in the within matter and for Answer to the Petition of Victor G. Lands to reclaim property, admits, denies and alleges as follows:

1. In answer to paragraph IV of the said Petition, denies each and every allegation thereof.

First Defense

I.

Victor G. Lands was at all times mentioned herein and at all times material, an officer, director and shareholder of the bankrupt corporation.

II.

In October, 1952, Victor G. Lands loaned to the bankrupt corporation the sum of \$20,000.00 on an unsecured basis and became thereby a creditor of the bankrupt corporation.

III.

Subsequent to the loan of the \$20,000.00 as aforesaid, the Victor G. Lands transferred or caused to be transferred to himself on December 3, 1952, the sum of \$5,000.00 and on December 12, 1953, a further sum of \$5,000.00, or a total [16] sum of \$10,000.00. The moneys were transferred by check drawn by Victor G. Lands on the corporation bank account. Your petitioner alleges that these transfers of funds

constituted a preference to the said Victor G. Lands under Section 60a of the Bankruptcy Act.

IV.

Petitioner alleges that in addition to the sum of \$10,000.00 as aforesaid, the said Victor G. Lands transferred other and additional sums to himself and made further transfers of property of the corporation to himself and that the said transfers and conveyances constituted preferences under Section 60a of the Bankruptcy Act.

Second Defense

I.

Petitioner alleges that on or about December 3, 1952, Victor G. Lands transferred the sum of \$5,000.00 of the bankrupt's funds to himself; that on or about December 12, 1952, said Victor G. Lands transferred an additional \$5,000.00 and thereafter other portions of the bankrupt's funds and properties to himself on other occasions.

II.

Petitioner alleges that there was no consideration paid to the bankrupt corporation at the time of these transfers and conveyances and the said transfers and conveyances were made at a time when the corporation was solvent or as a result of these said transfers and conveyances would be rendered insolvent or unable to pay its debts as they matured.

III.

Petitioner alleges that the true and exact financial condition of the company was well known to Victor

G. Lands and that the said transfers and conveyances were and are fraudulent as against the creditors of this estate and this petitioner as Trustee herein elects to void the said transfers and conveyances.

Wherefore, this Trustee prays that the Court dismiss the [17] Petition in Reclamation and that this Court enter a Judgment in favor of this estate and against the said Victor G. Lands in the sum of \$10,000.00.

/s/ KYLE Z. GRAINGER, JR.,

QUITTNER AND STUTMAN,

By /s/ WILLIAM J. TIERNAN.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1953. [18]

[Title of District Court and Cause.]

AMENDMENT TO PETITION FOR ORDER TO
SHOW CAUSE RE PREFERENCE AND
FRAUDULENT CONVERSION

Comes now your petitioner, Kyle Z. Grainger, Jr., and respectfully represents and shows to the referee as an amendment to the above petition:

Third Claim

I.

Petitioner repeats and realleges paragraphs I, II, III, and IV of the first claim and makes them a part of the third claim as though fully set forth herein.

II.

That the withdrawal in the sum of \$10,000.00 as aforesaid by Victor G. Lands was without the authorization or ratification of the board of directors or other shareholders and was in violation of Sections 824, 825, and 826 of the Corporations Code of the State of California, being a withdrawal or distribution of the assets of the corporation to a shareholder.

/s/ KYLE Z GRAINGER, JR.,

QUITTNER AND STUTMAN,

By /s/ WILLIAM J. TIERNAN.

Duly verified.

[Endorsed]: Filed September 11, 1953, [20]
Referee.

[Title of District Court and Cause.]

MEMORANDUM OPINION RE STATUS
OF DR. VICTOR G. LANDS

Quittner & Stutman, Attorneys for Trustee.

Vivian M. Feld, Attorney for Dr. Victor G. Lands.

Petition in reclamation of Dr. Victor G. Lands.
Petition of Trustee to recover from Dr. Lands alleged preferences or fraudulent transfers.

I.

Statement of the Case

This is an involuntary bankruptcy commenced January 16, 1953. An adjudication in bankruptcy

was made on June 16, 1953. On January 19, 1953, John H. Hellen was appointed and qualified as Receiver in Bankruptcy of the estate and acted as such until July 22, 1953, when Kyle Z. Grainger, Jr., was appointed and qualified as Trustee in Bankruptcy.

On March 9, 1953, Victor G. Lands, hereafter referred to as Dr. Lands, filed a petition to reclaim from the estate \$10,000.00 in cash, which the Receiver obtained from the firm of Yeckes-Echenbaum of New York City, New York, as partial [60] payment for certain railroad cars of peas grown in Mexico by the bankrupt and shipped by it to said firm. On August 17, 1953, the Trustee in Bankruptcy filed an answer to said petition in reclamation, asserting that the said Dr. Lands loaned the bankrupt the sum of \$20,000.00 on an unsecured basis and thereby became a general creditor of the bankrupt, but that thereafter he caused to be transferred to him, out of the assets of the bankrupt estate, on December 3, 1952, the sum of \$5,000.00, and on December 12, 1952, another sum of \$5,000.00, making a total of \$10,000.00; and that these transfers constituted preferences under Sec. 60a of the Bankruptcy Act. It is also alleged in the answer that at the time of the transfers the bankrupt was either solvent, or as a result thereof, would be rendered insolvent. It was further alleged that the said Dr. Lands knew at the time of these transfers the financial condition of the bankrupt, and that the transfers were fraudulent as against the creditors of the bankrupt estate. On August 3,

1953, the Trustee filed his petition for an order directing the said Dr. Lands to return the said sum of \$10,000.00 to the bankrupt estate either as voidable preferences under Sec. 60a of the Bankruptcy Act or as fraudulent transfers under Sec. 67d of the Act. On September 11, 1953, the trustee filed an amendment to his said answer, wherein he set forth that the withdrawal of said sum of \$10,000.00 by Dr. Lands was without the authority of the board of directors of the bankrupt corporation and in violation of Secs. 824, 825, and 826 of the California Corporations Code. Dr. Lands filed his answer to the said trustee's petition, in which, in effect, he denies that the said transfers of the said sum of \$10,000.00 to him were either preferential or fraudulent.

These petitions and answers were consolidated, and a hearing was had before the Referee on September 11, 1953. [61] The reporter's transcript of that hearing was filed October 8, 1953.

These controversies were tried before the Referee by consent of the parties, and submitted to him for decision upon briefs, all of which have been filed.

II.

Statement of the Evidence

The bankrupt corporation was engaged in the commission brokerage and merchandising business at San Diego. It grew, harvested and sold peas, tomatoes and other crops, grown both in Mexico and in Southern California. Dr. Lands was an officer, viz., Secretary-Treasurer, but never did know much

of anything about its financial affairs. His duties as Secretary-Treasurer were merely nominal. The corporation's business was managed and operated by Wallace Springstead, its President. Dr. Lands held 40% of the capital stock of the corporation, Wallace Springstead 40%, and a Sidney H. Elzer the balance of 20%. These three persons were the directors of the corporation.

On or about October 3, 1952, the bankrupt was in need of fresh money to carry on its operations. Dr. Lands agreed to loan \$20,000.00 to the corporation, if he were given security for the loan. Thereupon, pursuant to a resolution of the Board of Directors, a written agreement was entered into and signed by the three directors of the bankrupt corporation, wherein and whereby Dr. Lands agreed to loan the corporation \$20,000.00, the same to be deposited in a special bank account to be opened by Dr. Lands in his own name only, all proceeds from the sale of crops to be deposited therein, he only to have the right to draw checks on said account, and he to have the right to draw out of said special account the \$20,000.00 due him out of the first \$20,000.00 received or derived from the [62] crops. This agreement was never recorded. Nor did any creditors of the bankrupt know about it, except the three directors. Such special bank account was opened and Dr. Lands deposited \$20,000.00 therein. But, instead of drawing out the first \$20,000.00 received from the proceeds of crops to repay his loan, Dr. Lands, upon

the request and insistence of the said Wallace Springstead, paid money out of said special account to pay current bills of the corporation, until December 2, 1952. On that date, Dr. Lands paid himself out of such account \$5,000.00 in partial payment of such loan. On December 2, 1952, before such withdrawal, the balance in such special account was \$8,520.00. At the end of that day, by reason of other withdrawals, the balance left in said special account was \$520.20. On December 12, 1952, the balance of said special account was \$3,211.83, having been built up by deposits to that amount from the \$520.20 left on December 2, 1952. The following deposits were made (1952): December 3, \$652.70; December 5, \$2880.00; December 8, \$6020.00; December 9, \$2382.02; December 10, \$972.02; December 12, \$5,000.00. On December 12, 1952, Dr. Lands paid himself out of the said special account \$5,000.00 to apply on the loan. He thus paid himself back \$10,000.00 on his loan of \$20,000.00.

The corporation was insolvent on and after December 2, 1952. The corporation maintained a separate bank account of its own at all times. No crop mortgage on said crops was given to Dr. Lands, nor was any account receivable from the sale of said crops ever formally assigned to him as security for said loan.

On August 13, 1953, the receiver filed herein his report and account showing that on February 10, 1953, he received into the estate \$10,978.94 as an account receivable from Yeckes-Echenbaum of New

York City, New York, for the sale [63] to them of certain carloads of peas.

III.

Questions Presented

1. Did the Referee have jurisdiction to try alleged voidable preferences or fraudulent transfers?

2. Has Dr. Lands an equitable lien upon the \$10,978.94 so paid to the receiver in bankruptcy?

3. Did Dr. Lands hold an equitable assignment of the accounts receivable arising out of the sale of crops?

4. Were the said two payments of \$5,000.00 each to Dr. Lands either voidable preferences under Sec. 60a, or fraudulent transfers under Sec. 67d, of the Bankruptcy Act?

5. Did Dr. Lands forfeit any security he had through such agreement with the corporation by not repaying himself the \$20,000.00 out of the first moneys that went into such special fund?

6. Was the payment of said sum of \$10,000.00 in violation of Secs. 824, 825 and 826 of the Corporations Code of California?

IV.

Comment on the Law

1. Jurisdiction.

Referees in Bankruptcy do not ordinarily have jurisdiction to try controversies involving voidable

preferences or fraudulent transfers. However, such jurisdiction can be conferred by consent, as was given here. *MacDonald v. Plymouth County*, 20 ABR. NS. 1, 286 U.S. 263, 52 S. Ct., 505, 75 L. Ed. 1093; *Page v. Arkansas*, 20 ABR. NS. 6, 286 U.S. 269, 52 S. Ct., 507, 76 L. Ed. 1096; in *re Rourke*, ED. Ky., 40 ABR. NS. 428, 28 F. S. 515. B.A., Sec. 2a(7) now requires that objection to jurisdiction must be presented at the outset and cannot any more be presented at any time before the [64] Referee makes his decision, as was previously held in the case of *Cline v. Kaplan*, 323 U.S. 97, 57, ABR. NS. 195, 65 S. Ct. 155, 89 L. Ed. aff'g CCA 7, 56 ABR. NS. 103, 142 F. (2) 301. Of course, trustees may oppose the allowance of claims filed upon the ground that the creditors were the recipients of voidable preferences or fraudulent transfers. B. A. Sec. 57g. And the findings of the Referee thereon, when they become final, are *res judicata*. *Breit v. Moore*, CCA 9, 34 ABR. 295, 220 F. 9. Whether a Referee may go beyond the mere disallowance of a claim on the ground and render a summary judgment against the claimant for any excess has not yet been definitely settled in the Ninth Circuit, or by the Supreme Court. The trend of recent decisions is that Referees have such power. In *re Mercury Engineering*, SD. Cal., 60 F. S. 786; *Columbia v. Lochner*, CCA 4, 179 F. (2) 630. In the case of in *re Nathan*, SD. Cal., 98 F. S. 686, the court held in effect that a creditor by presenting for examination and allowance his claim against a bankrupt estate impliedly consents to adjudication by the bankruptcy court

in summary proceedings, of not only the merits of the claim and of any defenses or set-offs thereto, but also the merits of any counterclaim for affirmative judgment which the trustee may properly assert in response to the claim, and such filing of the claim gives the consent necessary to confer jurisdiction on the bankruptcy court to adjudicate counterclaims for preferences, fraudulent transfers, etc. See, also, Fed. Rules Civ. Proc. 13(2), 41a(2); Gen. Or. 37; in re Petroleum Conversion, DC. Del. 99 F. S. 899.

2. In General.

A trustee may seek recovery of property in one suit on the grounds of both voidable preference and a fraudulent transfer, and the statement of claim alleging such grounds is not subject to attack on the basis of multifariousness or [65] in consistency, at least in the federal courts. *Kraver v. Abrahams*, ED. Pa., 29 ABR. 365, 203 F. 782; Fed. R. Civ. Proc. No. 8 (e)2.

If a person lending money to a corporation and taking security therefor is an officer of the corporation, this does not of itself invalidate the transaction, but merely requires that the evidence be subjected to close scrutiny as to the good faith of the officer; and such a transaction is valid if fairly entered into. *Federal Mining & Engineering v. Pollak*, (Nev.), 85 P. (2) 1008; *Arnold v. Phillips*, CCA 4, 117 F. (2) 497. One who is a director of a corporation acts in a fiduciary capacity. *Bainbridge v. Stoner*, 16 C. (2) 423, 106 P. (2) 423. There is no

question but that the transaction here was entered into and carried out in good faith. The corporation received the benefit of the money loaned to it by Dr. Lands.

3. Dr. Lands Did Not Have an Equitable Lien Upon the Proceeds of the Crops Before They Were Deposited in His Special Account.

It is contended by counsel for Dr. Lands that he had an equitable lien upon the proceeds of the sale of all crops after the said agreement of October 3, 1952, was entered into. Equitable liens are recognized in California as between the parties. *Mannon v. Pesula*, 59 V.A. (2) 597, 139 F. (2) 336; *Wagner v. Sariotti*, 56 C. A. (2) 693, 133 P. (2) 430; in re *Henshaw Estate*, 68 C. A. (2) 627, 157 P. (2) 390; *Washington Lumber & Millwork v. Maguire*, 213 C. 13, 1 P. (2) 437. But when bankruptcy comes, a different situation arises. Sec. 70c of the Bankruptcy Act provides that, as of the date of bankruptcy, the trustee in bankruptcy has all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings upon the property of the bankrupt. The [66] money paid to the Receiver was the proceeds of an unassigned account receivable of the bankruptcy as of that time. In the case of *Stepp v. McAdams*, CCA 9, 88 F. (2) 925, it was held that equitable liens will not be enforced against creditors without notice either actual or constructive, since the law frowns upon secret charges against property; and the rule in California accords with this general law. See, also, *Nat'l Bank v. Moore*, CCA 9, 41

ABR. 409, 247 F. 913; and by way of analogy, *Hayes v. Gibson*, CCA 9, 48 ABR. 570, 279 F. 812, aff'g in re New York & Baltimore, DC. Del., 47 ABR. 435, 276 F. 145. In the case of *Corn Exchange v. Klauder*, 318 U.S. 434, 63 S. Ct. 679, 87 L. Ed. 884, 52 ABR. NS. 596, aff'g in re Quaker City, CCA 3, 50 ABR. NS. 345, 129 F. (2) 895, it was held that the Bankruptcy Act, and particularly Sec. 70c thereof, contemplates the striking down of secret liens, such as unrecorded equitable liens. See, also, *Jud Whitehead Heater v. Obler*, 111 C. A. (2) 861, 245 P. (2) 608; *Menick v. Carson*, SD. Cal., 96 F. S. 817. There has been no showing here that any of the creditors of the bankrupt knew, or has cause to know, of the agreement between Dr. Lands and the bankrupt corporation, except the three directors of the corporation. By virtue of B. A. Sec. 70c, the trustee occupies the status of an ideal creditor without notice, armed with every right and power which State law gives its most favored creditor who has acquired a lien by legal or equitable proceedings.

In re *Waynesboro Motor*, 21 ABR. NS 449, 60 F. (2) 668; in re *Baumgartner*, CCA 7, 20 ABR. NS., 153, 55 F. (2) 1041; in re *Allee*, CCA. 7, 19 ABR. NS. 584, 55 F. (2) 76. The Trustee can enforce the rights of any creditor without notice for the benefit of all creditors of the estate, even if some of them did have notice. *Moore v. Bay*, 18 ABR. NS. 675, 284 U.S. 4, 52 S. Ct. 3, 76 L. Ed. 133. Even if Dr. Lands held a formal assignment of the account receivable from Yerkes-Echenbaum Co., which he did not, he still would have had to comply with Secs. 3017-3029 of the California Civil Code relating to the filing of notice of such assignments with county

recorders to protect himself against the rights of the Trustee. *Menick v. Carson*, SD. Cal., 96 F. S. 817.

So we are forced to conclude that Dr. Lands has no valid claim upon the said sum of \$10,879.94 in the estate as against the title thereto of the Trustee, upon any equitable lien theory.

4. The Agreement of October 2, 1952, Did Not Create in Favor of Dr. Lands an Equitable Assignment of the Accounts Receivable Arising Out of the Sale of the Crops.

To constitute an equitable assignment, the intent to do so and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. To do so is fatal to the claim. There must be a transfer of such a character that the fund holder can safely pay, and is compelled to do so, even though he be forbidden by the assignor. *East Side Packing v. Fahy Market*, CCA 2, 24 F. (2) 644. To constitute a valid equitable assignment, the words used must clearly create irrevocable appropriation of such funds. *Lowe v. Columbia Nat'l Life*, WD. Pa., 2 F. S. 99. No particular form is necessary to constitute an effective equitable assignment. *Gomes v. Warn*, 33 C. A. (2) 313, 91 P. (2) 214; *Van Order v. Golden West Credit*, 122 C. A. 132, 9 P. (2) 572; *Los Angeles City School District v. Tucker*, 99 C. A. 390, 278 P. 507. A promise to pay a debt out of a particular fund is not binding upon the promisor, and therefore, does not create an equitable lien. *Kup-*

penheimer v. Mornin, CCA 8, 78 F. (2) 261. An equitable assignment requires that there should be a complete and present right to the fund conferred on the assignee, not depending upon any future acts of the assignor to make it effective. Duncan v. Guillet, 62 Colo., 220, 161 P. 299; Day v. Charlton, 61 Okla. 130, 160 P. 606. An equitable assignment exists and a lien thereby is created upon a fund where there has been an actual appropriation thereof, either by the giving of an order to the holder of the fund or by some action whereby [68] such holder is authorized to pay the amount direct to the creditor without the further intervention of the debtor. In re Goodman-Kinstler, SD. Cal., 32 ABR. 624.

But the agreement of October 2, 1952, fails to meet these tests, at least as to the requirement that the assignor should not retain any authority over the fund, or the power to collect it. Here the bankrupt corporation collected the funds deposited in the special account; and, until so deposited, might have appropriated such funds to its own use. There was not any direction to any purchaser of the crops to pay direct to Dr. Lands. If the bankrupt corporation did appropriate to its own use the money collected from accounts receivable, the only remedy Dr. Lands would have had against the corporation would have been a suit for damages. Duncan v. Guillet, 62 Colo., 220, 161 P. 299; Day v. Charlton, 61 Okla., 130, 160 P. 606.

5. Were the Said Two Payments of \$5,000.00 Each to Dr. Lands, Either a Voidable Preference Under Sec. 60a of the Bankruptcy Act, or a Fraudulent Transfer Under Sec. 67d or 70e of the Act?

This is the most difficult problem we have to solve here. No evidence was presented at the hearing to show that Dr. Lands had reasonable cause to believe that the bankrupt was insolvent at the dates of the two payments. Of course, there is the presumption that the board of directors of a corporation know the financial condition of the corporation which it is their duty to manage and control. *Van Denburgh v. Tungsten Beef*, 20 C. A. (2) 463, 67 P. (2) 360; *First Nat'l v. Five-O-Drilling*, 209 C. 569, 289 P. 844. In the case of *Pacific Vinegar Works v. Smith*, 152 C. 507, 93 P. 85, the court goes even further and declares flatly that the officers and directors of a corporation are chargeable with knowledge [69] of the facts which its books of account and records disclose. Counsel for Dr. Lands cited the case of *Gleason v. Bush*, 166 NYS 321, 100 Misc. Rep. 608, an authority for the principle that the mere fact that a person is a director or stockholder of a corporation does not make him chargeable with actual knowledge of its business transactions, or of entries in its books. But here, in matters of this kind, we are bound by California law. *Laugharn v. Bank of America*, CCA 9, 88 F. (2) 551, 33 ABR. NS. 656.

It is, also, true that a director of an insolvent corporation cannot receive to himself any preference

or advantage over the other creditors in payment of his debt. *Bonney v. Tilley*, 109 C. 346, 42 P. 439; *Nixon v. Goodwin*, 3 C. A. 358, 85 P. 169. And this is irrespective of whether or not the director had knowledge, or reasonable cause to believe, that his corporation was insolvent. And the Trustee has under B. A. Sec. 70e, all the rights, remedies and powers of a creditor under State law with reference to fraudulent transfers.

It seems clear that Dr. Lands held a lien upon the money in his special bank account to the extent of the amount due him upon his loan, but the question arises what is the status of money paid into that account when the corporation was insolvent. Trustee's counsel contends that this special bank account did not give Dr. Lands a lien because he did not have possession of the money deposited in the bank; the relation between the bank and Dr. Lands being that only of debtor and creditor. *Gonsalves v. Bank of America*, 16 C. A. (2) 169, 105 P. (2) 118. But no one could draw upon this special account except Dr. Lands and he held sole possession of the chose in action of his right to withdraw the money from the bank. In this way, the situation is analogous to that of the creation of a pledge; and valid pledges create valid liens under the [70] California law. Cal. Civ. Code, Secs. 2987, 2988. We see nothing invalid in that sort of pledge created here. The evidence offered and received indicates insolvency only from December 2, 1952, on. On December 5, 1952, the balance in the special account was \$8,500.00; and on that date Dr. Lands withdrew \$5,000.00 from the

account to apply on his loan. No evidence was offered to show that this balance arose by reason of payments into the account when the bankrupt was insolvent. After such withdrawal of December 2, 1952, and the cashing of other checks, there was left in the special account \$520.20. The following deposits were thereafter made (1952): December 3, \$652.70; December 5, \$2880.00; December 8, \$6,020.00; December 9, \$2382.02; December 10, \$972.02; December 12, \$5,000.00. When Dr. Lands withdrew the \$5,000.00 on December 12, and after other checks were cashed, there was left \$11.83 in the special account.

So it seems fair to conclude that the second payment of \$5,000.00 to Dr. Lands came out of funds deposited in the special account while the corporation was insolvent. Therefore, under the principles of *Bonney v. Tilley*, *supra*, and *Nixon v. Goodwin*, *supra*, the second withdrawal of \$5,000.00, at least to the extent of \$4479.80 thereof, since \$520.20 was left on deposit as of December 2, 1952, was illegal and amounted to a fraudulent transfer which the Trustee has the right to set aside and recover under B. A. Sec. 70e.

6. Dr. Lands Did Not Forfeit Any Security He Had Under the Agreement and the Special Bank Account Because He Did Not Pay Himself the First \$20,000.00 Deposited Therein.

While the agreement provides that Dr. Lands shall reimburse himself out of the first \$20,000.00 de-

posited in the special account, this agreement was modified by an executed oral agreement under which Dr. Lands permitted the corporation to use a large portion of the money for business operation [71] purposes. Cal. Civ. Code, Sec. 1698. Here was done, with the consent of both parties, something that was not required to be done under the agreement, *Platt v. Butcher*, 112 C. 634, 44 P. 1060. The oral agreement here was fully performed (*Klein Norton v. Cohen*, 107 C. A. 325, 290 P. 613), and the evidence as to such oral agreement, and its execution, is clear and convincing (*Columbia Casualty v. Lewis*, 14 C. A. (2) 64, 57 P. (2) 64, 57 P. (2) 1010. *Houghton v. Lawton*, 63 C. A. 218, 218 P. 475). So it is apparent that the said requirement of the agreement was waived by both parties without impairing the security nature of the special bank account.

7. Sees. 824, 825, and 826 of the California Civil Code Do Not Apply Here Since There Was No Distribution of Any Part of the Assets of the Bankrupt Corporation to Dr. Lands.

The mere statement of this proposition suggests this answer. See, by way of analogy, *Williams v. Levy*, CCA 9, 19 ABR. NS. 389, 54 F. (2) 18.

V.

Conclusion

We conclude, therefore, that Dr. Lands has no interest in the money paid to the Receiver, and that he must pay back to the Trustee \$4479.80 of the

money paid to himself out of the special bank account.

Counsel for the Trustee will, therefore, prepare, serve and file, pursuant to Gen. Rule No. 7 of this court, appropriate Findings of Fact, Conclusions of Law and Order.

Dated: October 29, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 30, 1953, Referee. [72]

In the District Court of the United States, Southern
District of California, Central Division

No. 3433

In the Matter of

UNIVERSAL PRODUCE COMPANY, a California Corporation,

Bankrupt.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER**

This matter came on to be heard before the undersigned Referee in Bankruptcy on Sept. 11, 1953, upon the reclamation petition of Dr. Victor G. Lands, and the answer thereto filed by the Trustee in Bankruptcy, and upon the petition of the Trustee to recover a preference and/or a fraudulent conveyance and the answer thereto of Dr. Lands, and upon the amendment to the answer filed by the

Trustee herein with leave of the Court first obtained.

The Trustee herein appeared through his attorneys, Quittner and Stutman, Mr. William J. Tierman of counsel. Doctor Victor G. Lands appeared with his attorney, Vivian M. Feld.

Evidence was received and the matter having been submitted on briefs, all of which have been filed, the Referee makes the following Findings of Fact, Conclusions of Law and Order: [86]

Findings of Fact

I.

The bankrupt corporation was engaged in the commission brokerage and merchandising business at San Diego. It grew, harvested and sold peas, tomatoes and other crops grown both in Mexico and Southern California. Dr. Lands was an officer, to wit, secretary-treasurer, but never did know much, if anything, about its financial affairs. His duties as secretary-treasurer were merely nominal. The corporation's business was managed and operated by Wallace Springstead, its president. Dr. Lands held 40% of the capital stock of the corporation, Wallace Springstead, 40% and Sidney H. Elzer the balance of 20%. These three persons were the Directors of the corporation.

II.

On or about October 3, 1952, the bankrupt was in need of fresh money to carry on its operations. Dr. Lands agreed to loan \$20,000.00 to the corporation if he were given security for the loan. Thereupon,

IV.

Findings of Fact and Conclusions of Law

These are set forth in the Order entered herein on Dec. 22, 1953.

V.

Documents Accompanying This Certificate

1. Petition to reclaim Property, filed Mar. 9, 1953.
2. Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 3, 1953.
3. Answer to Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 11, 1953.
4. Interim Account and Report of Receiver, filed Aug. 13, 1953.
5. Answer to Petition to Reclaim Property, filed Aug. 17, 1953.
6. Amendment to Petition for Order to Show Cause re preference and fraudulent conversion, filed Sept. 11, 1953. [100]
7. Memorandum of Facts, Law, Points and Authorities, filed Sept. 21, 1953.
8. Brief of Trustee in Support of Preference and Fraudulent conveyance, filed Oct. 13, 1953.
9. Reply Brief of Victor G. Lands, filed Oct. 20, 1953.

10. Memorandum Opinion re status of Dr. Victor G. Lands, filed Oct. 30, 1953.

11. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Nov. 21, 1953.

12. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

13. Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

14. Petition filed Dec. 31, 1953, for a review of said order of Dec. 22, 1953.

Dated this 5th day of January, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed January 5, 1954. [101]

PETITIONER'S EXHIBIT No. 1

Agreement

This Agreement made and entered into this 3rd day of October, 1952, by and between Universal Produce Company, a corporation, having its principal place of business in the City of San Diego, County of San Diego, State of California, and Vic-

Conclusions of Law

I.

The Court has jurisdiction over the parties hereto and the Court has jurisdiction to try the issues raised by the petition of reclamation and the answer and the petition to recover a preference or a fraudulent transfer and the answer thereto.

II.

Dr. Lands is not entitled to recover anything upon his reclamation petition.

III.

No lien in favor of Dr. Lands was created upon the monies which were received by the Receiver from Yeckes-Eichenbaum of New York City, after the filing of the bankruptcy petition, equitable or otherwise, by reason of the provisions of Sec. 70c of the Bankruptcy Act.

IV.

Dr. Lands does not have a lien, equitable or otherwise, upon the said sum of \$4,479.80 received by him out of the said special account on Dec. 12, 1952; and such transfer was made to him as a general unsecured creditor of the bankrupt corporation on account of an antecedent due him arising out of such loan. [89]

V.

Since a director of an insolvent corporation who is also a creditor thereof, cannot receive any preference or advantage in the payment to himself of his

claim against the corporation over other general creditors of the corporation, irrespective of whether he had actual knowledge of the insolvent condition of the company, the payment of \$4,479.80 to him on Dec. 12, 1952, was void as a fraudulent transfer under California state law, and Sec. 70e of the Bankruptcy Act.

Order

It Is Hereby Ordered, Adjudged and Decreed pursuant to said Findings of Fact and Conclusions of Law, that

I.

The petition in reclamation of Dr. Lands be, and the same hereby is denied.

II.

Dr. Victor G. Lands is ordered to pay to the Trustee herein the sum of \$4,479.80, together with interest at the rate of 7% per annum until paid, and, upon his failure to do so, the Trustee may apply to this Court for such other and further orders as may be necessary to secure the payment of the said sum.

Dated: December 22, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed December 22, 1953, [90]
Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER OF DECEMBER 22, 1953

To the Hon. Reuben G. Hunt, Referee in Bankruptcy:

Comes now your petitioner, Victor G. Lands, and respectfully represents as follows:

I.

On or about March 9, 1953, petitioner, Victor G. Lands, filed a Petition to Reclaim Property in the above-entitled matter, seeking to reclaim from the above-entitled estate the sum of \$10,000.00 in cash which the Receiver had obtained from a New York firm as partial payment for certain railroad cars of peas grown by the bankrupt and shipped to said firm; on or about August 17, 1953, the Trustee in Bankruptcy filed his answer to said Petition to Reclaim Property; on or about August 3, 1953, the Trustee in Bankruptcy filed a petition to recover from petitioner, Victor G. Lands, the sum of \$10,000.00 as a preference and/or fraudulent conveyance and thereafter petitioner duly filed his answer to the trustee's said petition.

II.

Both matters came on for hearing before the Hon. Reuben G. Hunt, Referee in Bankruptcy, on September 11, 1953, and evidence having been [91] given, introduced and heard in open court, both matters were duly submitted.

III.

On or about October 30, 1953, the Hon. Reuben G. Hunt filed a Memorandum Opinion Re Status of Dr. Victor G. Lands denying the said Petition in Reclamation and declaring that the sum of \$4479.80 should be paid to the said Trustee by petitioner. Thereafter, counsel for the Trustee presented proposed Findings of Fact, Conclusions of Law and Order to which counsel for petitioner filed specific objections and corrections. A hearing on said objections and corrections was had on December 1, 1953, and counsel for the Trustee was directed to prepare and submit to counsel for petitioner for her approval a second set of proposed findings, conclusions and order. Counsel for the Trustee did so. This second set of proposed findings, conclusions and order was disapproved by counsel for petitioner who again filed specific objections thereto.

IV.

On December 22, 1953, the Hon. Reuben G. Hunt prepared, signed, filed and had entered his own Findings of Fact, Conclusions of Law and Order; that said Order pursuant to said Memorandum Opinion denied petitioner's Petition in Reclamation and ordered petitioner to pay to the Trustee the sum of \$4479.80. A copy of said Order is attached hereto and marked Exhibit "A."

V.

The said Findings of Fact, Conclusions of Law and Order of the said Hon. Reuben G. Hunt are erroneous for the following reasons:

A. The said Findings of Fact fail to include findings warranted and required by the evidence and set forth in the said Memorandum Opinion, to wit:

(1) That the entire transaction involved herein was entered into and carried out in good faith by petitioner, Victor G. Lands.

(2) That no evidence was presented to show that Dr. Lands [92] had reasonable cause to believe that the bankrupt was insolvent at the dates of the two payments.

B. The statement in the Findings of Fact, Paragraph III, page 3, lines 22-23, that "Dr. Lands did not have a lien" is not a finding of fact but is a conclusion of law and is contrary to law.

C. The statement in the Findings of Fact, Paragraph IV, page 3, lines 27-28, that "The bankrupt corporation was insolvent on and after December 2, 1952," is not a finding of fact but is a conclusion of law; such a finding or conclusion is not supported by the evidence and is contrary to law.

D. The Conclusion of Law, Paragraph II, page 4, that "no lien in favor of Dr. Lands was created thing upon his reclamation petition" is not supported by the evidence and is contrary to law.

E. The Conclusion of Law, Paragraph III, page 4, that "on lien in favor of Dr. Lands was created upon the monies which were received by the Receiver from Yeckes-Eichenbaum of New York City, after the filing of the bankruptcy petition equitable

or otherwise by reason of Sec. 70e of the Bankruptcy Act” is contrary to law.

F. The Conclusion of Law, Paragraph IV, page 4, that “Dr. Lands does not have a lien, equitable or otherwise, upon the said sum of \$4479.80 received by him out of the said special account on Dec. 12, 1952; and such transfer was made to him as a general unsecured creditor of the bankrupt corporation on account of an antecedent debt due him arising out of such loan” is not supported by the evidence and is contrary to law.

G. The Conclusion of Law, Paragraph V, page 5, that “Since a director of an insolvent corporation who is also a creditor thereof, cannot receive any preference or advantage in the payment to himself of his claim against the corporation over other general creditors of the corporation, irrespective of whether he had actual knowledge of the insolvent condition of the company, the payment of \$4479.80 to him on Dec. 12, 1952, was void as a fraudulent transfer under California [93] state law, and Sec. 70e of the Bankruptcy Act” is not supported by the evidence and is contrary to law.

VI.

The said Order is erroneous in that Dr. Lands had a lien upon the monies received from the Receiver to the extent of \$10,000 from Yeckes-Eichenbaum after the bankruptcy proceedings were filed and by reason of said lien is entitled to recover from the trustee the sum of \$10,000 as prayed for in his Petition to Reclaim.

VII

The said Order is further erroneous in that the payment to Dr. Lands on December 12, 1952, of \$4479.80 was not a fraudulent transfer to him under California state law and Section 70e of the Bankruptcy Act and was not void.

VIII.

In connection with the within Petition for Review, your petitioner respectfully requests that the following documents be certified to the District Judge:

1. Petition of Victor G. Lands to Reclaim Property filed March 9, 1953.
2. Trustee's Answer to said Petition to Reclaim Property filed August 17, 1953.
3. Trustee's Petition for Order to Show Cause Re Preference and Fraudulent Conversion filed August 3, 1953.
4. Answer of Victor G. Lands to Trustee's Petition for Order to Show Cause Re Preference and Fraudulent Conversion.
5. Reporter's Transcript of the evidence presented at hearing on the above-described petitions on September 11, 1953, before the Hon. Reuben G. Hunt.
6. Opening brief and points and authorities filed by Victor G. Lands in support of his Petition in Reclamation.

7. Brief of the Trustee in answer thereto and in support of his said petition. [94]

8. Reply brief of Victor G. Lands.

9. Memorandum Opinion of Reuben G. Hunt re Status of Dr. Victor G. Lands, dated October 30, 1953.

10. Trustee's Proposed Findings of Fact, Conclusions of Law and Order.

11. Petitioner's objections and corrections to said proposed findings, conclusions and Order and Petitioner's proposed Findings of Fact, Conclusions of Law and Order.

12. Second set of trustee's Findings of Fact, Conclusions of Law and Order.

13. Petitioner's objections and corrections to trustee's proposed second set of Findings of Fact, Conclusions of Law and Order.

14. Findings of Fact, Conclusions of Law and Order, dated December 22, 1953.

15. The within Petition for Review of Referee's Order of December 22, 1953.

Wherefore, your petitioner prays that said order be reviewed by the Judge of the District Court; that said order be reversed; that petitioner's petition in reclamation be granted and the trustee be ordered to pay to petitioner the sum of \$10,000; that the trustee be denied any relief on his petition to establish a preference and/or a fraudulent conversion or

conveyance; that no order be made directing any payment by petitioner to the trustee and that the order directing the said payment by petitioner to the trustee of the sum of \$4,479.80 be reversed; for such other and further relief as to the court may seem proper.

/s/ VICTOR G. LANDS,
Petitioner.

/s/ VIVIAN M. FELD,
Attorney for Petitioner.

Dated: December 31, 1953.

Duly verified.

[Endorsed]: Filed December 31, 1953. [95]
Referee.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF REFEREE'S
ORDER DENYING PETITION IN RECLA-
MATION AND VOIDING FRAUDULENT
TRANSFER

At the request of Reuben G. Hunt, a Referee in Bankruptcy of this Court, pursuant to Bankruptcy Rule 207a of this Court, the undersigned Referee in Bankruptcy presents to the Court his certificate on review of the order of the said Referee in Bankruptcy Hunt entered herein Dec. 22, 1953, denying the petition in reclamation of Dr. Victor G. Lands

and decreeing that he pay over to the bankrupt estate the sum of \$4,479.80 received by him as a fraudulent transfer.

VIVIAN M. FELD, and
TOBIAS G. KLINGER,

Attorneys for Victor G. Lands, Petitioner
on Review.

QUITTNER AND STUTMAN,

Attorneys for Kyle Z. Grainger, Jr., Trustee,
Respondent on Review. [99]

I.

Statement of the Case

This is covered up to the point where the Referee's Memorandum Opinion was filed on Oct. 30, 1953. This opinion accompanies this Certificate. Findings of Fact, Conclusions of Law and Order were signed and filed and entered herein on Dec. 22, 1953. Thereafter and on the 31st day of December, 1953, Dr. Victor G. Lands filed herein his petition for a review of the said order of Dec. 22, 1953.

II.

Questions Presented

These are also set forth in the Memorandum Opinion.

III.

Comment on the Evidence and the Law

This is also set forth in the Memorandum Opinion.

IV.

Findings of Fact and Conclusions of Law

These are set forth in the Order entered herein on Dec. 22, 1953.

V.

Documents Accompanying This Certificate

1. Petition to reclaim Property, filed Mar. 9, 1953.
2. Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 3, 1953.
3. Answer to Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 11, 1953.
4. Interim Account and Report of Receiver, filed Aug. 13, 1953.
5. Answer to Petition to Reclaim Property, filed Aug. 17, 1953.
6. Amendment to Petition for Order to Show Cause re preference and fraudulent conversion, filed Sept. 11, 1953. [100]
7. Memorandum of Facts, Law, Points and Authorities, filed Sept. 21, 1953.
8. Brief of Trustee in Support of Preference and Fraudulent conveyance, filed Oct. 13, 1953.
9. Reply Brief of Victor G. Lands, filed Oct. 20, 1953.

10. Memorandum Opinion re status of Dr. Victor G. Lands, filed Oct. 30, 1953.

11. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Nov. 21, 1953.

12. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

13. Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

14. Petition filed Dec. 31, 1953, for a review of said order of Dec. 22, 1953.

Dated this 5th day of January, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed January 5, 1954. [101]

PETITIONER'S EXHIBIT No. 1

Agreement

This Agreement made and entered into this 3rd day of October, 1952, by and between Universal Produce Company, a corporation, having its principal place of business in the City of San Diego, County of San Diego, State of California, and Vic-

tor G. Lands, of 416 North Bedford Drive, City of Beverly Hills, County of Los Angeles, State of California,

Witnesseth:

Whereas the said Universal Produce Company is a corporation organized under and by virtue of the laws of the State of California and is engaged in the produce business, and

Whereas the said Universal Produce Company is the owner of two crops to be harvested during the months of October, November and December in the year 1952, to wit: 80 acres of hillside tomatoes planted on land rented by the said Universal Produce Company from one Bert Culbert and located on Los Angeles Avenue in the Los Pasas area of the State of California and 250 acres, more or less, of peas planted on the Leon Vincente Ranch and the Lorenzo Escalante Ranch in San Quintin, Baja, Mexico, and

Whereas the said Universal Produce Company is in need of additional funds in the amount of \$20,000.00 to enable the bringing to harvest of the said hereinabove described crops, and

Whereas the said Universal Produce Company is desirous of obtaining the said additional \$20,000.00 from the said Victor G. Lands,

Now, Therefore, in consideration of the promises and mutual covenants herein contained, the parties hereto agree as follows:

1. All monies derived or acquired or coming in from or [102] obtained as a result of or because of said crops of tomatoes and peas shall be deposited in a special checking account to be opened for that purpose at the San Diego Main Branch of the Bank of America in San Diego, California, in the name of the said Victor G. Lands. All checks drawn upon said special checking account shall require the signature of the said Victor G. Lands and only the said Victor G. Lands shall be authorized to write checks upon said account.

2. The said Victor G. Lands agrees to advance to the said Universal Produce Company the sum of \$20,000.00, all of which shall be deposited in said special checking account.

3. The said Universal Produce Company in consideration of said advance of \$20,000.00 by the said Victor G. Lands hereby agrees as follows:

a. That the first \$20,000.00 received or derived or coming in from said crops shall be paid directly to the said Victor G. Lands as a return of the new \$20,000.00 advanced by him.

b. That after said initial payment of the said \$20,000.00 has been made, an additional sum of \$15,000.00 shall then be paid to the said Victor G. Lands out of the next \$25,000.00 that is derived or brought in from said crops, as a return to the said Victor G. Lands of his capital investment in the said Universal Produce Company.

In Witness Whereof, the parties hereto have set their hands and seal the day and year above written.

[Seal] UNIVERSAL PRODUCE
COMPANY, by

[Seal] /s/ WALLACE SPRINGSTEAD,
President;

[Seal] /s/ SIDNEY H. ELZER,
Vice-President;

[Seal] /s/ VICTOR G. LANDS,
Secretary-Treasurer.

[Seal] /s/ VICTOR G. LANDS,

[Endorsed]: Filed September 11, 1953, [103]
Referee.

[Title of District Court and Cause.]

MEMORANDUM

The petition of Dr. Victor G. Lands to review an order of the referee dated December 22, 1953, be and is hereby affirmed.

The trustee is directed to forthwith submit to me proposed order affirming said referee.

Dated: This 7th day of April, 1954.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed April 7, 1954. [105]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR REVIEW
AND AFFIRMING ORDER OF REFEREE

The petition of Dr. Victor G. Lands to review an order of the Referee dated December 22, 1953, came on for hearing before the Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California, on the 29th day of March, 1954; the petitioner appeared by Tobias G. Klinger and Vivian M. Feld and the Trustee appeared by Quittner and Stutman by George M. Treister; the matter was submitted to the Court upon the briefs of the parties and the record previously filed herein; the Court having considered the briefs and the entire record in the above-entitled matter, and being fully advised in the premises, now, therefore, it is

Ordered, that the petition of Dr. Victor G. Lands to review the order of the referee dated December 22, 1953, be and the same is hereby denied; and it is further

Ordered, that the order of the Referee dated December 22, 1953, be and the same is hereby affirmed.

Dated, this 20th day of April, 1954.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed April 20, 1954. [106]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Victor G. Lands, Petitioner for Review in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in this action on April 20, 1954, denying the petition for review of the said Victor G. Lands and affirming the order of the Referee of December 22, 1953.

/s/ VIVIAN M. FELD,
Attorney for Appellant.

[Endorsed]: Filed May 18, 1954. [109]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS UPON WHICH HE INTENDS TO RELY

Appellant, Victor G. Lands, states that the points on which he intends to rely on the appeal in this action are as follows:

1. That the court erred in failing to include in its Findings of Fact a finding that the entire transaction was entered into and carried out in good faith by Victor G. Lands and such a finding is supported by sufficient evidence.

2. That the court erred in failing to include in its Findings of Fact a finding that no evidence was presented to show that Dr. Lands had reasonable

cause to believe that the bankrupt was insolvent at the dates of the two payments and such a finding is supported by sufficient evidence.

3. That there is no evidence to support the finding and/or conclusion that "the bankrupt was insolvent on and after December 2, 1952."

4. That Dr. Lands has a lien on the monies which were received by the Receiver from Yeckes-Eichenbaum of New York City in the amount of \$10,000 still remaining due, owing and unpaid to him. [110] The conclusion of law to the contrary is erroneous and not supported by the law or evidence.

5. That the court erred in its conclusion of law that "Dr. Lands did not have a lien, equitable or otherwise, upon the said sum of \$4479.80 received by him out of the said special account on December 12, 1952; and such transfer was made to him as a general unsecured creditor of the bankrupt corporation on account of an antecedent debt due him arising out of such loan."

6. That the conclusion of law that "since a director of an insolvent corporation who is also a creditor thereof, cannot receive any preference or advantage in the payment to himself of a claim against the corporation over other general creditors of the corporation, irrespective of whether he had actual knowledge of the insolvent condition of the company, the payment of \$4479.80 to him on December 12, 1952, was void as a fraudulent transfer under California state law and Section 70e of the Bank-

ruptcy Act" is erroneous and is not supported by the law or evidence.

7. That Dr. Lands was entitled to receive the said sum of \$4479.80 on December 12, 1952.

8. That Dr. Lands had a lien on said funds.

9. That the denial of the petition in reclamation and the order for refund by Dr. Lands of the sum of \$4479.80 are not supported by the law or the evidence.

Dated: May 18, 1954.

/s/ VIVIAN M. FELD,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 18, 1954. [111]

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 3433

Before the Honorable Reuben G. Hunt,
Referee in Bankruptcy.

In the Matter of:

UNIVERSAL PRODUCE COMPANY,

Bankrupt.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS OF HEARING ON ORDER TO SHOW
CAUSE, TRUSTEE v. VICTOR G. LANDS

Appearances:

For the Trustee:

W. J. TIERNAN, ESQ.

For Respondent Victor G. Lands:

MISS VIVIAN M. FELD.

STUART P. FISCHER, ESQ.

For the Bankrupt:

Friday, September 11, 1953—10 A.M.

The Referee: Universal Produce, is that ready?

Mr. Tiernan: Yes, your Honor.

Miss Feld: Ready, your Honor.

The Referee: Proceed.

Miss Feld: Call Dr. Lands.

VICTOR G. LANDS

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Miss Feld:

Q. Will you state your name, please, Dr. Lands?

A. Victor G. Lands.

Mr. Tiernan: We got a check for \$10,978.94 from the New York firm of Yeckes-Eichenbaum, which was, as far as I know, an account receivable of the company.

The Referee: You got the check?

Mr. Tiernan: We did get the check. We have the money now.

Miss Feld: Do you have that check?

Mr. Tiernan: The check has been cashed and the money put into the regular trustee account.

The Referee: Is the money in the estate?

Mr. Tiernan: The money is in the estate.

Miss Feld: That ten thousand dollars? [2*]

Mr. Tiernan: Yes. It came in some time after the appointment and qualification of the Receiver. I

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Victor G. Lands.)

would say it would be in February of this year, some time around February of this year, but I am not sure.

Miss Feld: On that question of the demand on the Receiver to turn over the \$10,000, I think we can stipulate on that, don't you?

The Referee: The Receiver's account on file shows that on February 16, 1953, he received from Yeckes-Eichenbaum the sum of \$10,978.94.

Mr. Fischer: May I, for the purpose of the record, state that I am the attorney for the corporation? I am Stuart Fischer, and I individually represented Mr. Elzer, who is an officer and director of the corporation. I am not concerned in this proceeding at all except so far as the bankruptcy is concerned, nor an active participant in this proceeding. I am more or less of a spectator.

Miss Feld: Are you willing to stipulate that on October 20, 1952, Dr. Lands loaned Universal Produce the sum of \$20,000?

Mr. Tiernan: We will so stipulate for the record, and I would like also a stipulation that the Doctor was an officer and director of the company.

Miss Feld: So stipulated.

The Referee: How many shares did he hold in the company? [3]

Miss Feld: 40 per cent.

The Referee: Who holds the other 60 per cent?

The Witness: Mr. Springstead held 40 per cent, and Mr. Elzer held 20 per cent.

Q. (By Miss Feld): Dr. Lands, will you tell

(Testimony of Victor G. Lands.)
the Court the circumstances leading up to this loan of \$20,000 on October 20, 1952?

A. On or about October 3, 1952, the Universal Produce Company had two crops which were growing, one in Ventura County, a tomato crop, and one a pea crop in San Quintine, Baja California, Mexico. At that particular time Mr. Springstead found himself short of funds to harvest these particular crops, and it was imminent that some money be obtained to do so. This was a relatively large investment, and the returns expected from these particular crops were also relatively large. Having made some representations to distributors in the East, namely, Earl Longo, of Philadelphia, and Mr. Yeckes, of Yeckes-Eichenbaum, to obtain advance moneys for this crop, Mr. Springstead was unable to make any agreement, because of the exorbitant rates demanded by these distributors. Rather than see the crops fail, I proceeded to lend the corporation the necessary moneys to harvest these particular crops. At first Mr. Springstead thought he might need \$13,000 to do the job.

The Referee: What is the name of that man?

The Witness: Springstead. [4]

The Referee: What relation did he have to the corporation?

The Witness: He was the president and general manager. I borrowed such an amount, and I presented myself with such a check at San Diego. However, Mr. Springstead then declared that such an amount was inadequate to do the job, and that he

(Testimony of Victor G. Lands.)

needed something closer to \$20,000. I returned several days later with a check for \$20,000, and there was a meeting of the Board of Directors, and Mr. Springstead, Mr. Elzer, Miss Feld and myself were present; and at that particular time an agreement was made as to how the \$20,000 would be distributed and utilized. I attempted to obtain some security for the loan at that particular time, and, in particular, I asked for a crop mortgage, and this was negated by Mr. Springstead, when he stated that he would be unable to do business in Mexico with a crop mortgage hanging over the crop. At that particular time, therefore, in order to facilitate the loan, a substitute security setup was created around the proceeds from the two crops.

Mr. Tiernan: Just a minute. You are referring to an agreement that was made. I think the agreement should speak for itself.

The Witness: Yes.

The Referee: Is the agreement in writing?

Miss Feld: Yes, there is a written agreement, [5] which I will introduce.

The Referee: Why not introduce that?

Miss Feld: All right. We have a carbon of the agreement. Will you take a look at that, Mr. Tiernan?

The Referee: Between whom was this agreement?

The Witness: This agreement was made between Universal Produce Company and myself. This agreement was made in writing and was committed

(Testimony of Victor G. Lands.)

to the minutes, and a duplicate resolution was made for the main branch of the Bank of America, San Diego, for their records, in order for them to facilitate the utilization of the money.

Q. (By Miss Feld): Dr. Lands, I am going to show you a document. Is that the document that you just testified to? A. Yes.

Q. Do you recognize the persons on this document? A. Yes, I do.

Q. Was this document signed in your presence by the people whose names appear thereon?

A. Yes, they were. It was also signed in your presence.

Mr. Tiernan: It may go in. There is no objection. I don't object to the minutes going in, with the understanding that they may not be binding on the Trustee in Bankruptcy.

The Referee: Well, they are not binding on anybody [6] here. The minutes might be entirely wrong. But the minutes can be received in evidence?

Mr. Tiernan: Yes, your Honor; they can go in.

Q. (By Miss Feld): Doctor, I am going to show you a document entitled "Board of Directors' Minutes of Meeting of October 3, 1952," and ask you if you recognize these documents?

A. Yes. The signatures are the same as those on the agreement.

Miss Feld: May we offer these in evidence?

The Referee: Yes. They will be received in evidence as Exhibit 2.

Q. (By Miss Feld): I show you a third docu-

(Testimony of Victor G. Lands.)

ment entitled "Minutes of Meeting of Board of Directors of Universal Produce Company, a California corporation, held on October 4, 1952," and ask you if you recognize that document?

A. Yes, I do. This document was also executed by the same people.

Q. Do you know if a copy of this document was left with the Bank of America, San Diego Main Branch, in San Diego?

A. Yes, a copy was left with the San Diego Branch of the Bank of America.

Q. Is this the document you spoke of a few minutes ago, when you said a copy of the resolution was [7] left with the bank?

A. Yes.

Miss Feld: We offer this as Petitioner's Exhibit 3.

The Referee: All right.

Q. (By Miss Feld): Dr. Lands, after this document was executed and the agreement went into effect, will you tell us what procedures were taken to put this agreement into execution?

A. Yes. Some of the moneys which were deposited, of the \$20,000, which were deposited in the main branch of the Bank of America at San Diego, checks would be written on that particular special account by me to the Universal Produce Company, at the request of Mr. Springstead, depending upon his needs in running the business and harvesting the two particular crops that have been mentioned.

Q. After this agreement was executed, did you

(Testimony of Victor G. Lands.)

or the Universal Produce Company set up a special account at the San Diego Main Branch of the Bank of America?

A. Yes; according to the resolution, such an account was set up, so that actually there were two accounts at the Bank of America. One was a special account, and the other was the regular account that had never been changed, that the Universal Produce already had.

Q. From October 3rd on, where were the proceeds obtained from the San Quintine pea crop or the Oxnard tomato crop, where were they [8] deposited?

A. These proceeds were deposited to my special account.

Q. At this particular time in the operation of the business of Universal Produce was there any other money coming in from any other crop?

A. Little or nothing. Universal Produce Company operated a seasonal business, and the only moneys that could have possibly come in were moneys such as late railroad claims, or some such small items. In the entire period during which this particular agreement was in effect, I think some \$450 of railroad claims was deposited, and such moneys were immediately written over to the account of the Universal Produce as it was needed by Mr. Springstead.

The Referee: The money that came in, what bank account did that go into?

The Witness: Into the special account.

(Testimony of Victor G. Lands.)

The Referee: Into your special account?

The Witness: Yes.

The Referee: And then, as Mr. Springstead needed the money, you wrote the checks?

The Witness: Yes, sir, wrote the checks to Universal Produce Company.

Miss Feld: I think the resolution would clarify the situation. All moneys that came in would go into the special account, and the only ones the bank would honor, [9] checks to Universal Produce, would be a check written by the Doctor on the special account.

Q. (By Miss Feld): Dr. Lands, prior to this agreement of October 3rd and the time of its execution, had you ever written any checks on the corporation account? A. No.

Q. What was the situation, as far as the corporate business was concerned, prior to this time, and your relation thereto?

Mr. Tiernan: Excuse me. I don't want to trouble the record with objections, but I think the question is a little broad.

The Referee: I will let him answer. Go ahead.

Mr. Tiernan: I will withdraw the objection.

The Witness: The relationship that I had to the particular corporation originally was one of investment. And Mr. Elzer came into the corporation as a sustaining investor, in the sense that at the particular time he came in the corporation needed banking credit, and by setting up a special drafting account, he put up a \$20,000 savings account, which

(Testimony of Victor G. Lands.)

was held by the Bank of America as a guarantee against the drafting credit. The particular relationship of Mr. Elzer and myself was strictly advisory, for instance, when crises would occur from time to time in the corporation. Other than that Mr. Springstead ran the business. He was both general manager and the prime [10] motivator, and took the brunt of the responsibility.

The Referee: This special account, were you the only one that could draw checks on that?

The Witness: Yes, sir.

Q. (By Miss Feld): Now, Dr. Lands, after the account was set up, did certain moneys come in from the pea and tomato crops?

A. Yes, at a rapid rate.

Q. And out of those moneys were you ever repaid any of the \$20,000 which was loaned to the corporation?

A. Yes, sir.

Q. How much were you actually repaid?

A. \$10,000.

Q. If you recall, do you know the dates on which those payments were made?

A. Yes; December 1, 1952.

Q. What was the amount of the payment?

A. \$5,000. And another \$5,000 on December 12, 1952.

Q. And at the present time, under the agreement of October 3rd, is there anything due, still owing and unpaid out of the \$20,000 loaned by you to the corporation?

A. Yes.

Q. How much is still unpaid out of that \$20,000?

(Testimony of Victor G. Lands.)

A. \$10,000.

Q. You heard Mr. Tiernan state to the Court that [11] the records show that the Receiver received a check in February of \$10,978.94 on the payment of Yeckes-Eichenbaum. To your knowledge, was any other money due Universal Produce Company from Yeckes-Eichenbaum as a result of this pea crop?

A. No; there were no other moneys due to the Universal Produce Company.

Q. And from your knowledge of the corporate affairs, what did this check of ten thousand and some odd dollars represent to the Universal Produce Company?

A. It would represent the remainder of the moneys due the Universal Produce from Yeckes-Eichenbaum. Of course, I thought there was more money than that due. But the last I noticed there were \$22,000 due Universal Produce by Yeckes-Eichenbaum.

The Referee: This agreement here, Petitioner's Exhibit No. 1, provides, in Paragraph 3 (a), "that the first \$20,000 received or derived or coming in from such crops shall be paid directly to the said Victor G. Lands as a return of the new \$20,000 advanced by him."

Was this money from Yeckes-Eichenbaum obtained for crops?

The Witness: Yes.

Miss Feld: The crops were crops they sold for Universal Produce Company.

(Testimony of Victor G. Lands.)

The Referee: Was this through a broker?

The Witness: Through a distributor in New York. [12]

The Referee: Distributing the crops of Universal Produce?

The Witness: Yes, sir.

Miss Feld: I don't know. Mr. Springstead would know.

The Referee: Had you received, prior to bankruptcy, any money in this special account from the sale of crops?

The Witness: Yes, sir.

The Referee: Do you remember how much—\$10,000?

The Witness: There was much more than that. There was close to—I think we have exact figures, but perhaps some \$90,000. That sounds more like it. I am not sure, but that is close to the figure.

Miss Feld: We have copies of the bank statements that show exactly what it was.

Mr. Tiernan: Do you want to put those in?

Miss Feld: Well, if the rest of you would like to see them.

The Referee: Have you got the canceled checks?

Miss Feld: I have some of them. Most of them are in the San Diego office. Mr. Springstead would have them. We have the check books.

The Witness: Yes, the check stubs.

The Referee: Are you going to put in the special account, from the time it was opened, October 4th, up until January? [13]

(Testimony of Victor G. Lands.)

Miss Feld: Yes. These are copies kept by Mr. Barry, who is one of the assistant managers.

The Referee: That will be Petitioner's Exhibit 4.

Have you any supporting documents regarding these charges? You say you haven't the checks?

Miss Feld: I have some of the checks. I have the check books. I will look at the checks I have.

Mr. Tiernan: I have never seen the check books.

The Referee: That is the check book of the special account?

The Witness: Yes, sir.

Miss Feld: Yes. These are the deposit books for all that were sent up from San Diego, that is, those were deposit books for all that were mailed up to us.

The Referee: You say you have some canceled checks?

Miss Feld: I am checking right now to see. I think I do. I think we have all of them.

The Referee: All of the canceled checks?

Miss Feld: All that we have got.

The Referee: These check book stubs, are they in your handwriting?

The Witness: Yes, sir.

Q. (By Miss Feld): Dr. Lands, these deposits, were they made by yourself?

A. No. They were made either by—the girl in the office, I guess.

Q. Do you have any recollection how you got hold [14] of those checks?

(Testimony of Victor G. Lands.)

A. They were mailed up to me from San Diego.

The Referee: This account in the Bank of America, was it in your name?

The Witness: Yes, sir.

The Referee: Not in the corporation's name?

The Witness: No.

The Referee: I think we will tear these stubs out, so that they won't encumber the record.

Miss Feld: We have no objection.

The Witness: Shall I pull these out?

The Referee: Don't spoil them.

Mr. Tiernan: I think we ought to have the canceled checks.

The Referee: Maybe the Receiver has some of them. I don't know. Let's put them all in together.

Miss Feld: I brought everything we had.

The Referee: This bank statement, I think it is a duplicate, isn't it?

Miss Feld: I think it probably is the original, but I have no way of knowing whether all the canceled checks are there or not.

The Referee: This statement, Petitioner's Exhibit 4 that you got from the bank, that covers the entire account, doesn't it?

Miss Feld: Yes, that's right. [15]

The Referee: Suppose I attach those together all as part of that one exhibit.

Mr. Tiernan: I think that would be fine.

Miss Feld: That is all right.

The Referee: All right. That will be part of Petitioner's Exhibit 4.

(Testimony of Victor G. Lands.)

Miss Feld: I think that is all.

Cross-Examination

By Mr. Tiernan:

Q. Dr. Lands, referring to the agreement of October 3rd, were you asked or did you volunteer to abstain from voting in connection with the resolution which approved the execution of this agreement by the company? A. No.

Q. Referring now to Paragraph 3 (b) here, which provides that after the payment of the original \$20,000, you would receive an additional \$15,000. Was that to be in the nature of a bonus or interest, or was it discussed at all?

A. Yes, it was discussed.

Q. Was it considered to be owing on your obligation, or a bonus, or——

The Referee: Just a minute. Just let him talk.

The Witness: When I made the original investment with Mr. Springstead, our association was in the form of a partnership, and at that particular time the investment [16] was \$15,000, and, because of the large——

The Referee: You put \$15,000 in with him?

The Witness: Yes. Originally that \$15,000 was to be returned within a very short period of time.

The Referee: Was this during the partnership?

The Witness: Yes. Because of the continued difficulties that the partnership sustained, such moneys were unable to be returned. With the crop

(Testimony of Victor G. Lands.)

that was planted in San Quintine, the representations made by Mr. Springstead were that the returns would be of such magnitude that they would more than take care of all the obligations of the corporation, and still have ample amounts left to take care of the original obligation or understanding that I would receive that original investment back.

Q. (By Mr. Tiernan): At this particular meeting in October was the financial condition of the company discussed? A. Yes.

Q. Wasn't it your feeling that the company had been operating for several months at a continuing loss? A. That I do not know.

Q. But you knew the company had no money?

A. Had no money to harvest the crop.

Q. They needed cash for operation?

A. That is right.

Q. You said at the time the company was only concerned, or, was only concerned with the tomato crop in [17] California and the pea crop in Mexico?

A. That's right.

Q. There were no other problems of the company at the time? A. That's right.

Q. As far as you know? A. That's right.

Q. You stated that you brought up the question of a crop mortgage, and Mr. Springstead turned that down; is that right? A. That is correct.

Q. Was the question of your getting an assignment of any accounts receivable ever discussed?

A. I wasn't interested in——

The Referee: Answer yes or no.

(Testimony of Victor G. Lands.)

The Witness: No.

Q. (By Mr. Tiernan): No discussion of any assignment? A. No, sir.

Q. With the exception of this agreement, which is in evidence, were there any documents signed between yourself and the company, promissory notes, or a mortgage, or an assignment of any kind?

A. No.

Q. This constitutes the entire agreement between the parties?

A. That and the minutes and the resolution [18] at the bank, yes.

Q. Do you recall having your deposition taken in my office? A. Yes, I do.

Q. That was in connection with the involuntary proceeding. I am reading you——

The Referee: Let him read it first.

Mr. Tiernan: Yes, your Honor.

The Referee: Refer to the page.

Mr. Tiernan: Page 18.

Mr. Fischer: I have an extra copy.

The Referee: This is a deposition taken in this bankruptcy proceeding on April 21, 1953, at Los Angeles.

Mr. Tiernan: Page 18.

The Referee: Before Louis Sommers, a Notary Public. Go ahead.

Q. (By Mr. Tiernan): Mr. Lands, will you read the questions beginning on line 9, and your answers, and tell me if those questions were asked by me, and if those were your answers at that time?

(Testimony of Victor G. Lands.)

The Referee: What page?

Mr. Tiernan: Page 18, beginning on line 9.

The Witness: Yes.

The Referee: Did you give those answers?

The Witness: Yes.

Q. (By Mr. Tiernan): Will you read them for the [19] record?

The Referee: There is no necessity for that.

Mr. Tiernan: I want to get them into the record.

The Referee: Well, but he testified exactly the same thing right here, that this bank account handled all the receipts. There is no variance between this and his testimony.

Mr. Tiernan: All right. Thank you.

The Referee: I mean the special bank account?

The Witness: Yes, sir.

The Referee: Go ahead.

Q. (By Mr. Tiernan): Doctor, you testified that the money which was deposited in this so-called special account in the bank at San Diego principally came from the proceeds of these pea and tomato crops? A. That is correct.

Q. Were you in charge of the deposits?

A. No.

Q. How did you know that the money came into the special account from the proceeds of the pea and tomato crops? How did you know that?

A. The only way I would know anything at any time, under any circumstances, in the handling of this particular business, was from information from Mr. Springstead.

(Testimony of Victor G. Lands.)

Miss Feld: The deposit slips in evidence [20] would show that.

The Witness: Yes, they do.

Miss Feld: The deposit slips show——

The Referee: He said he got the information from Mr. Springstead.

Mr. Tiernan: Yes, that's right.

Can I see Exhibit 4, your Honor? That is the big one, the bank account and the——

The Referee: All right. It is right here.

Q. (By Mr. Tiernan): Now, Doctor, there is a check in here somewhere for \$2,100, payable to Miss Feld, Miss Vivian Feld. That check is in addition to the two checks for \$5,000. Will you tell us what that was for? It is in here somewhere. It is a check dated December 17th, check No. 42, in the sum of \$2,100, payable to Cash, which is endorsed by Miss Feld.

A. That's right.

The Referee: Wait a minute. Was this check drawn on your special account in the Bank of America that you testified about?

The Witness: That's right.

The Referee: Check No. 42?

The Witness: Yes.

The Referee: All right.

The Witness: This check was drawn on December 17, 1952. Prior to December 17th, and shortly after December [21] 12th, when I wrote a check for myself for \$5,000, the second check I had written for \$5,000, Mr. Springstead needed picking cash,

(Testimony of Victor G. Lands.)

cash for picking the crop down in San Quintine.

The Referee: He needed ready cash?

The Witness: Yes; and he needed it immediately, and I forwarded to the Universal Produce Company, by cashier's bank check, \$2,100, and this is in repayment of the \$2,100.

The Referee: She cashed the check and gave you the money?

The Witness: That's right.

Q. (By Mr. Tiernan): What did you do with the money? You bought a cashier's check?

A. No, no.

Q. I didn't understand.

A. I think I stated——

The Referee: I understand him to say that, needing some quick money for picking, he drew a cashier's check——

The Witness: I sent \$2,100 down out of my personal money.

The Referee: To take care of this emergency situation?

The Witness: That's right.

The Referee: And, to make up for that, you drew a check for \$2,100 on your special account, and Miss Feld cashed it for you and gave you the money?

The Witness: Yes, sir, that's right. [22]

Q. (By Mr. Tiernan): Why was it handled in that fashion? Wouldn't it be just as simple to draw the check payable to Universal?

A. At that particular time the draft that was

(Testimony of Victor G. Lands.)

due from the East had not yet arrived, so that there wasn't available cash in the bank account.

The Referee: You mean in the special bank account?

The Witness: Yes, sir.

The Referee: Apparently this check was cashed December 30, 1952. Is that right?

The Witness: December 17th.

The Referee: That is right. It just shows cash December 30, 1952, and, according to this bank statement, the day before there was \$2,276.71 on hand, and the cashing of this check left \$176.71 in this special account.

The Witness: That is correct.

Q. (By Mr. Tiernan): Doctor, you will note in the agreement, Paragraph 3 (a), that it says that the first \$20,000 received or derived or coming in from said crops shall be paid directly to yourself?

The Witness: Yes.

Q. Now, I direct your attention to the bank statement, which indicates that during the month of October and during the month of November considerable sums in excess of \$20,000 were deposited in this account; is that correct? [23]

A. That is correct.

Q. You did not withdraw the \$20,000 then, did you?

A. No.

Q. And this was—well, according to your testimony, substantially all of the deposits were the proceeds of this pea crop?

A. That is correct.

Q. You did not draw out the first \$20,000, did

(Testimony of Victor G. Lands.)

you, that came in? A. No, that is correct.

Q. Now, Dr. Lands, you testified before that you never wrote checks on the regular or corporate bank account? A. That's right.

Q. You had the authority to countersign checks?

A. I had authority to write checks.

The Referee: On other accounts?

The Witness: Yes, on other accounts.

The Referee: We are talking about having authority to write checks on some bank account different than the special account?

The Witness: Yes.

The Referee: Was there another bank account?

The Witness: Yes, there always was.

The Referee: In the corporate name?

The Witness: Yes.

Q. (By Mr. Tiernan): Now, Doctor, when you withdrew [24] the sum of \$5,000 on those two occasions, a total of \$10,000, was there a directors' meeting held by the corporate officers?

A. No.

Q. Did you receive the consent or approval of Mr. Elzer or Mr. Springstead to do that?

The Referee: Let the record show that on December 2, 1952, a check for \$5,000 was cashed out of the special account by Dr. Lands, and a similar check for \$5,000 likewise cashed December 12, 1952, out of such special account. Now, will you answer that question?

The Witness: Will you repeat the question, please?

(Testimony of Victor G. Lands.)

Q. (By Mr. Tiernan): Did you get the consent of Mr. Elzer and Mr. Springstead to withdraw this \$10,000? A. No.

Q. Was there a corporate meeting of the Board of Directors giving you consent to withdraw that money?

A. No. Such approval wasn't necessary.

Q. The answer is No?

A. The answer is No.

The Referee: No approval was needed for that?

The Witness: No.

Mr. Tiernan: That is all. [25]

Redirect Examination

By Miss Feld:

Q. Dr. Lands, after January 1, 1953, to your knowledge, did any more money come in from the proceeds of the peas? A. Yes.

Q. Was there another bank account opened?

A. Yes.

Q. Will you tell us the circumstances under which it was opened?

A. The directors of the Bank of America had about enough of the business of Universal Produce Company, and they requested kindly that we transfer our activities elsewhere, and, complying with that, and desiring to continue the business, Mr. Springstead and Mr. Elzer and I talked of opening a new account at the U. S. National Bank in San Diego.

Q. I show you a bank statement and certain

(Testimony of Victor G. Lands.)

canceled checks connected therewith, of the United States National Bank at San Diego, and ask you if this represents the first account you just mentioned?

The Referee: That doesn't affect this case any.

The Witness: This is the same account.

Miss Feld: It is a new special account, a continuance of the first one.

The Witness: A new special account.

The Referee: All right. We'll mark that Petitioner's Exhibit No. 5. [26]

The Witness: In other words, any other checks that would be received from Yeekes-Eichenbaum in payment of peas sent to them would be deposited in the United States National Bank.

The Referee: In the new special account?

The Witness: In the new special account, yes.

Q. (By Miss Feld): And was the arrangement with the bank the same type of arrangement that you had with the Bank of America?

A. That's right.

Q. And at any time did you consider yourself as having the right, Dr. Lands, to enforce collection of these debts?

The Referee: That is not proper.

Miss Feld: That is all.

Mr. Tiernan: No further questions.

Miss Feld: I think that is all.

The Referee: Any further witnesses?

Miss Feld: No, no further witnesses.

The Referee: Perhaps we had better take a recess. It is 11:00 o'clock now.

(Short recess.)

Mr. Fischer: Your Honor, I wonder if I could interrupt a minute?

The Referee: Go ahead.

Mr. Fischer: Does your Honor see any reason why I, [27] as attorney for the corporation, should remain present at these proceedings?

The Referee: You are not involved in this?

Mr. Fischer: I don't think so.

* * *

Mr. Tiernan: Your Honor, the case of the Trustee involves a preferential transfer under 60(a) or a fraudulent transfer under 67(d). In the alternative, I want to amend our petition to set forth an unlawful distribution by the Board of Directors, pursuant to Section 824, et seq., of the Corporation Code of the State of California. The facts are there, but it is a matter of legal conclusion. I will make a motion to amend the petition to set forth that the actions of Dr. Lands constituted an unlawful distribution pursuant to Section 824, et seq., of the Corporation Code.

The Referee: Suppose he had security.

Mr. Tiernan: That is for the interpretation of the Court.

The Referee: I don't want this thing delayed any longer. I will consider that. Suppose we reserve that until 2:00 o'clock.

Miss Feld: May I take a look at the papers?

The Referee: I think the amendment ought to be filed. Can you get it on file so that we can go ahead

at 1:00 o'clock? How much longer will it take? Let's say 2:00 o'clock. [28]

Mr. Tiernan: If this amendment will delay the proceeding, I would just as soon make the motion at the end.

The Referee: No. If you want to amend, do it now, and have it on file before 2:00 o'clock.

Mr. Tiernan: Very well. May we proceed?

The Referee: Go ahead.

Mr. Tiernan: Point No. 1: Your Honor, it has been stipulated in the court proceeding to the effect that the Doctor was an officer, director and shareholder of the corporation, and I assume we can have the same stipulation, that he made a loan to the corporation of \$20,000.

Miss Feld: Yes.

Mr. Tiernan: And I believe we can have the same stipulation, that he was repaid the sum of \$5,000 on each of the dates of December 1st and December 12th, respectively, as appears in the earlier proceedings.

Miss Feld: Yes.

Mr. Tiernan: I think the issues involve two points, the financial condition of the company and the knowledge of Dr. Lands. One of the assets of this estate consists of so-called freight claims for damaged produce shipped, which was in the hands of so-called claim agents. These are the claim agents Sherman & Strahan. At my request Mr. Strahan, of that company, prepared a letter, which was shown to Miss Feld, and it may be stipulated that this [29] letter may be received in lieu of the testi-

mony of the freight agent concerning the value of this particular asset.

The Referee: What has this got to do with it?

Mr. Tiernan: It may tend to show solvency or insolvency, which is in issue. Unless Miss Feld is willing to stipulate concerning the solvency or insolvency of the company we will have to go——

The Referee: Is that stipulated?

Miss Feld: Yes.

Mr. Tiernan: It is stipulated that it may go in?

Miss Feld: Yes.

The Referee: That will be Trustee's Exhibit A.

Mr. Tiernan: I will call Dr. Lands as an adverse witness for just a few preliminary questions.

VICTOR G. LANDS

having been heretofore duly sworn, upon being recalled as an adverse witness by the Trustee, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Dr. Lands, you verified in these proceedings an answer to the petition for order to show cause concerning preference and fraudulent conversion, did you not? A. Yes.

Q. Do you recall signing that answer?

A. Yes, sir.

Q. Do you recall that you denied that the company [30] was insolvent?

Miss Feld: As of what date, Mr. Tiernan?

(Testimony of Victor G. Lands.)

The Referee: The record speaks for itself. Whatever it contains is there.

Q. (By Mr. Tiernan): Let me put it to you this way: Did you ever see the original petition for the recovery of preference which was filed by the Trustee in this proceeding? Did you examine that or discuss it with your counsel? A. Yes.

Q. Then you knew that the Trustee alleged that on December 1st and December 12th, 1952, at the time you transferred the sum of \$10,000 to yourself, the Trustee alleges that the corporation was insolvent at that time? A. Yes, sir.

Q. And you denied that? A. That's right.

Q. Did you cause an examination to be made of the books and records of the company?

A. I wish you would state that more specifically.

Q. You denied that the corporation was insolvent, in your verified answer, and therefore you must have had some information concerning the financial condition of the corporation, and I want to know where you got it.

A. That's right. At that particular time, specifying December 1st and December 12th, the only [31] information I obtained was the information I received from Mr. Springstead, and at that time the supposed return from the crop was in the neighborhood of \$100,000, and, based on that return, I made the loan of \$20,000 originally, and based upon that return, I took what was coming to me under the terms of the agreement.

Q. You set forth in your answer that the com-

(Testimony of Victor G. Lands.)

pany was solvent, and you alleged that they were not insolvent?

A. To the best of my knowledge, on that particular date, the company was solvent.

Q. And your allegations or representations are based entirely upon your conversations with Mr. Springstead; is that correct?

A. That is correct.

Q. Did you ever cause, or did you ever request an accountant by the name of George Peterson, of La Jolla, California, to make an examination of the books and records of the company in your behalf?

A. Yes. After the——

Q. When was that?

A. It was made after the proceedings in bankruptcy had been made, after January 16th.

Q. Would that be some time in January of this year?

A. It was some time in February.

Q. What were your instructions to Mr. Peterson?

A. This particular request from Mr. Peterson was [32] made on behalf of Mr. Fischer, who is the attorney for the corporation.

Q. You never contacted him yourself? You never spoke to Mr. Peterson yourself?

A. Yes, I called Mr. Peterson and asked him to make an audit, if possible.

Q. On behalf of whom?

A. On behalf of Mr. Fischer.

Q. Was that audit made to your knowledge?

(Testimony of Victor G. Lands.)

A. I talked to Mr. Peterson last night and I am explaining——

Q. Go ahead. Was an audit made?

The Witness: I would like to ask you——

The Referee: What is the question?

The Witness: I would like to have the question.

(The question was read by the reporter.)

The Referee: Answer yes or no. Do you know whether an audit was made?

The Witness: No, I don't know. I wasn't there.

Q. (By Mr. Tiernan): Did you ever communicate with Mr. Peterson and direct him not to furnish certain information to the Trustee in this case, or to his representatives? A. Yes.

Q. When was that communication made with Mr. Peterson? A. In the last few days. [33]

Q. Was Mr. Peterson engaged by yourself as a Certified Public Accountant?

A. What are you referring to now?

Q. Mr. Peterson has refused to give to the Trustee and his representatives information concerning the audit that was made of the books of this company in January of this year, on the basis that he was instructed to, by yourself?

A. That is correct.

The Referee: Did you instruct him not to give this information?

The Witness: The information was obtained by Yates early in the year.

Q. (By Mr. Tiernan): But you instructed him not to furnish certain information to the Trustee?

(Testimony of Victor G. Lands.)

A. Yes.

Mr. Tiernan: No further questions at this time.

Cross-Examination

By Miss Feld:

Q. Dr. Lands, were those instructions given to Mr. Peterson on advice of counsel? A. Yes.

Miss Feld: That is all.

Mr. Tiernan: I would like to call Mr. Elzer.

The Referee: Before you examine Mr. Elzer, I would like to have Dr. Lands come back. [34]

This agreement, Exhibit 1, that we have been talking about, recites as follows:

Paragraph 3(a): "That the first \$20,000 received or derived or coming in from said crops shall be paid directly to the said Victor G. Lands as a return of the new \$20,000 advanced by him."

Did you take any of that first \$20,000?

The Witness: No, sir.

The Referee: Did you apply any of that on the loan you made?

The Witness: No, sir.

The Referee: All right.

Mr. Tiernan: Call Mr. Elzer.

SIDNEY H. ELZER

called as a witness in behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Mr. Elzer, do you recall having your deposition taken in my office in connection with the bankruptcy proceedings? A. Yes.

Q. And Miss Feld was there, too? A. Yes.

The Referee: Examine him first, before you try to impeach him. [35]

Mr. Tiernan: I am just trying to refresh his recollection.

The Referee: Ask him your questions, and if he doesn't know, you can refresh his recollection.

Q. (By Mr. Tiernan): Mr. Elzer, do you remember the time we asked you a number of questions and you answered——

The Referee: That is not proper.

Q. (By Mr. Tiernan): You were questioned concerning the financial condition of the company?

The Referee: That is not proper either. If you want to find out what he knows about the financial condition, you can ask him, and if he testifies contrary to his deposition, you can produce it.

Q. (By Mr. Tiernan): Mr. Elzer, were the assets and liabilities of Universal Produce Company the same or approximately the same on January 16th, when the involuntary petition in bankruptcy was filed, as in the period of December 1, 1952, to December 12, 1952?

(Testimony of Sidney H. Elzer.)

The Referee: How would he know?

The Witness: I have no way of knowing exactly, but, as far as I know, they were substantially the same, as far as I know.

Mr. Tiernan: All right.

The Referee: You have no personal knowledge?

The Witness: No; I didn't see the books.

Q. (By Mr. Tiernan): Now, did you not stipulate with [36] myself, as representative of the petitioning creditors, through your counsel, Mr. Fischer, that the corporation was insolvent on January 16th, when the involuntary petition was filed?

A. To my knowledge, it was based on this fact. I had put up my personal bank account of \$20,000 for drafting credit, and some checks—previous to this the bank notified me that they were withdrawing \$9,000 from my account, to apply on some drafts the Universal Produce couldn't pay. And it was a question of whether these things were going to make enough to pay everything they owed, including myself, and including Dr. Lands, and I couldn't tell, and nobody else could.

Q. How much is the corporation indebted to you?

A. Well, actually \$9,000 there, and approximately four to five thousand for one other deal which was not reflected on the books, for another deal which the corporation had gone into, which does not reflect on the books.

Q. What would be the sum total of the obligations to you?

(Testimony of Sidney H. Elzer.)

A. Well, personally, I would say \$13,500 or \$14,000. The whole question was whether the corporation could, in fact, pay it, and if it could, they were solvent, and if it couldn't they were insolvent, and on January 16th I was led to understand that they would not be. [37]

Mr. Tiernan: That is all for Mr. Elzer.

The Referee: Any cross-examination?

Cross-Examination

By Miss Feld:

Q. Mr. Elzer, on December 1, 1952, to the best of your knowledge, was the company still shipping peas? A. Yes, sir.

Q. Now, on December 12th, were they still shipping peas?

A. Yes, to the best of my knowledge.

Q. What, to the best of your knowledge, was the expectation from the returns on the peas at that time?

A. Well, if they were to ship what we were told was in the crop, everybody would be paid.

Q. And that was the status as of the 1st and 12th of December, 1952; is that correct?

A. As far as I know, yes. I never saw the crops. I never knew how they were, except what I was told.

Q. Mr. Elzer, a few minutes ago, in answer to a question put to you as to whether the assets and liabilities of the corporation were the same on De-

(Testimony of Sidney H. Elzer.)

cember 1st and 12th, 1952, as they were on January 16, 1953, I believe you answered yes?

A. As nearly as I could know offhand. I never looked at the books, but, as of January 16th, when they went into involuntary bankruptcy, we weren't shipping. [38] They didn't pay me off, but they paid off Dr. Lands, and didn't pay off many of the bills.

The Referee: Did you know what assets they had in December?

The Witness: Not exactly, no, sir, but I knew roughly the potential crop.

The Referee: Any accounts receivable?

The Witness: Yes, there was.

The Referee: Do you know how much they were worth?

The Witness: No.

The Referee: Do you know how much the crop was worth?

The Witness: No.

The Referee: Did you know how much the accounts receivable were worth?

The Witness: No.

The Referee: Did you know what the liabilities were?

The Witness: Yes, approximately. We had gone into what the company owed and into their potential crops.

The Referee: What did you know about the total liabilities?

(Testimony of Sidney H. Elzer.)

The Witness: Well, as an estimate, \$80,000 to \$90,000 or \$100,000.

Q. (By Miss Feld): Mr. Elzer, did you know that as of December 12th the expectation from the crop, there was still an expectation of at least \$51,000 coming in from [39] the pea crop?

A. I can't say \$50,000, but we were supposed to be able to ship a lot of peas, if they didn't freeze.

Q. As of December 12th? A. Yes.

Q. Mr. Elzer, what was your status in the corporation, as far as controlling its affairs or management was concerned? A. None whatever.

Q. Did you spend any time in San Diego?

A. Yes. I made several trips with Dr. Lands.

Q. Is it true that those trips were made after your agreement of October 3, 1952?

A. I don't know how many were made, but some before and some after.

Q. Did you ever examine the books of the corporation?

The Referee: He said he never saw the books.

The Witness: No, I didn't see the books at that particular time.

The Referee: Did you ever see them?

The Witness: Yes, I saw them some time—I have seen them, but they were never up to date. I looked at them as close as I could; every time I would go down I would look at them, but they were never up to date.

The Referee: Were you ever able to get a com-

(Testimony of Sidney H. Elzer.)

plete [40] idea of the financial setup of the corporation from looking at the books?

A. Never a complete examination.

The Referee: Were you able to get an idea of the financial condition of the corporation from the books?

The Witness: Approximately—you can get an approximate picture, but never the complete picture.

The Referee: Do you remember that on Thursday, April 23, 1953, your deposition was taken in Mr. Tiernan's office on Spring Street down here?

Mr. Tiernan: In this case?

The Witness: Yes.

The Referee: Before what notary?

Miss Feld: Louis Summers.

The Witness: I remember it.

Q. (By Miss Feld): Directing your attention to page 5 of that deposition, I am going to read a question to you.

The Referee: Show it to him first, and then ask him.

Miss Feld: All right.

The Referee: Is there a copy of this in the file?

Miss Feld: No. This is the only copy I have.

Q. Mr. Elzer, I am directing your attention to line 7 on page 5, continuing through line 21. Was that question asked you, and was that answer given on that [41] particular day?

A. That's right. I still answer this the same way.

(Testimony of Sidney H. Elzer.)

You could never get an accurate picture. You would just have to figure out what you could.

Miss Feld: This testimony was a little garbled in places.

The Referee: He testified that he was never able to get an accurate picture from the books. Is that right?

The Witness: That's right.

The Referee: I don't see any conflict between the deposition and his testimony.

The Witness: Do you want me to give it in my own words?

The Referee: No. Wait a minute.

Miss Feld: I have no questions.

Mr. Tiernan: No questions.

Well, just another question or two.

Redirect Examination

By Mr. Tiernan:

Q. Mr. Elzer, you knew that Dr. Lands had requested Mr. George Peterson to make a survey or an audit of the books and records after the involuntary petition was filed, did you not?

A. Mr. Fisher wanted one made, so that he could act as attorney for the bankrupt company. They had no audit, and Mr. Fisher wanted one. [42]

Q. Did you ever discuss it with Dr. Lands?

A. No, sir.

Q. Did you ever discuss it with Mr. Peterson?

A. No.

(Testimony of Sidney H. Elzer.)

Q. Who was he?

A. He was an auditor hired approximately the first part of the last year of the business. Originally they had an accountant that never came up with any statement of any kind, and after the business operated about a year on that basis, they fired him and hired Mr. Peterson to install a new system. As long as he worked on them he was bringing them up to date, but he never came up with any statement.

Q. To your knowledge, it was Dr. Lands who requested Mr. Peterson to make this survey?

A. Yes.

Q. But you don't know the result of that?

A. No.

Mr. Tiernan: That's all.

Miss Feld: That's all. Call Mr. Yates.

RALPH J. YATES

called as a witness on behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Mr. Yates, what is your occupation? [43]

A. Public Accountant, practicing for the last 30 years in Los Angeles.

Q. Were you retained by the Trustee in this matter to collect certain financial information from the books and records of Universal Produce Company?

A. I was.

(Testimony of Ralph J. Yates.)

Q. What books and records did you use?

A. I used the original books of entry. I couldn't find the general ledger, and so I had then to resort to the original books of entry, the operating statements, financial statements, and had to refer to the entries in connection with the closing of the partnership and the opening or the inception of the corporation.

Q. Have you located the general journal or other corporate records since your survey or audit was made?

A. I have. I have located what we consider a combined cash sales, income and expense journal, and I have worked that back to the inception of the corporation and tied it in with the corporation's first income tax return, and brought up an operating statement up to about January 10th. The statements have been placed upon the books as recorded, and without audit.

Q. Did Dr. Lands or Miss Feld have any of those original records, or do they have any, do you know?

A. Dr. Lands and Miss Feld had a lot of records I couldn't locate, particularly the special bank account and [44] the canceled checks.

Q. Did they have any of the books of the company?

A. Other than the canceled checks, bank statements and this checkbook; that is all I know of.

Q. Incidentally, you were instructed by myself to pay particular attention to the financial condi-

(Testimony of Ralph J. Yates.)

tion of the company at the time Dr. Lands withdrew this \$10,000? A. I attempted to do so.

Q. Did you prepare or have you prepared a statement which shows not only the operation of the company for approximately a year preceding, for the year preceding the filing of the involuntary petition, but also a balance sheet as of the December date?

A. What I have prepared is a balance sheet—I have dated it January 10th, because that happened to be the last entry in the books, but there was no record between December 1st and January 10th, and there appeared to be no change in the financial position as of December 10th or 12th and January 10th. The assets were substantially the same and the liabilities were substantially the same.

Q. As to the assets, did you take the so-called book value of these assets?

A. Yes, I took the book value, rather than any appraised or obsolete value.

Q. You got the assets from the books and [45] also the liabilities from the books?

A. That is correct.

Q. Did your examination show tax liabilities?

A. It does. It shows the tax liabilities as recorded by the books. It does not show the liabilities for the last quarter.

Q. Incidentally, did you run a tape on the verified proofs of debt which are on file in this proceeding?

A. I didn't run a tape, but I ran a rough check

(Testimony of Ralph J. Yates.)

on it, and they are about, I believe, \$88,000 to date, and I believe there is a few more months to go for the remainder to be filed.

The Referee: Does anybody know where the claims are?

Mr. Tiernan: I think they are there, your Honor.

The Witness: In connection with that, I would like to state——

The Referee: Where did you get the information regarding the claims?

The Witness: From your files. The schedule was filed, and on the schedule it says, "Unsecured Claims Unknown."

The Referee: I thought you said you got the information from the claim file.

The Witness: They have got them inside there. There [46] is a list of creditors, with no amounts.

The Referee: Go ahead.

Q. (By Mr. Tiernan): Do your figures include the obligation to Dr. Lands?

A. It includes—yes, it does, because Dr. Lands' claim was included in the general accounts payable control. Speaking of that claim, I would like to qualify that, too. According to the books, Dr. Lands' claim was carried in the accounts payable control, and the money was so badly intermingled here that it is hard to tell which was a loan and which was a repayment, or just exactly what position he is in, because he had the canceled checks.

Q. Did your survey include the name of Mr. Elzer?

(Testimony of Ralph J. Yates.)

A. Yes. It is also in that accounts payable control.

Q. What did your investigation disclose concerning the operating condition of this business for the period February, 1952, to the end of December, 1952?

The Referee: Those operating records should show what the assets and liabilities were.

Mr. Tiernan: In view of the situation, we will have to confine our examination to a discussion of the assets and liabilities. Did you compile a list of those?

A. Yes. [47]

Q. From the books and records? A. Yes.

Q. What was that list?

A. I have, from the books and records, accounts payable, \$96,612.93; taxes, according to the books, \$711.72; accrued expenses, and unpaid salaries have not been set up on the books, and therefore I did not include them in my statement.

Mr. Tiernan: All right.

The Witness: Liabilities included in my statement total \$97,324.65.

Q. (By Mr. Tiernan): Does that include secured obligations and notes or loans payable?

A. That is partially correct. There are some contracts in there. The capital account, according to the books——

The Referee: No, not the capital.

The Witness: Well, the deficit, then, between the assets and liabilities——

(Testimony of Ralph J. Yates.)

The Referee: Have you?

A. No, I haven't. The figure on the assets, cash in bank, one bank, January 10th——

The Referee: We want it for December.

The Witness: Well, I will have to—cash in bank on the 1st of December, an overdraft of \$5,693.20.

The Referee: How about the 12th? [48]

The Witness: The 12th, \$5,904.95.

The Referee: What was that, cash in bank?

The Witness: Overdrawn. It has been that way through the whole——

The Referee: We are talking about December 1st and 12th.

The Witness: The assets were accounts receivable, \$1,560.36 on the 1st, and \$1,232.80 on the 12th. The freight claims were the same, \$14,123.81.

Mr. Tiernan: I want to interrupt a minute. These are the same freight claims as testified to. You can see what the actual value of those are.

The Referee: That doesn't prove anything. We have to have testimony as to the actual value. Go ahead.

The Witness: I am taking it from the books.

The Referee: What are those freight claims?

The Witness: That freight claim is \$32,015.13, and the reserve against freight claims and accounts receivable is \$36,181.80. Those figures are the same, no change on those figures. And the inventories here, \$14,350.42, the same figure on the 1st and the 12th. The fixed assets on the 1st and the 12th were the same, including automobiles and trailers,

(Testimony of Ralph J. Yates.)

\$6,991.38; equipment, \$19,197.29; office furniture and equipment, \$985.60; new equipment purchased during 1952, \$1,256.62; making a total for fixed assets of \$28,390.97, less the depreciation [49] shown on the books of \$2,852.33, which left a net for fixed assets in the amount of \$25,528.54. Other assets, which appear on the books, \$15,115.18; and good will, \$1,680.02.

The Referee: Good will is hardly an asset.

The Witness: Why I am pointing that out, that is the only equity they had when the corporation was formed.

The Referee: What is the total as per the books?

The Witness: As per the books?

The Referee: Yes.

The Witness: \$61,707.26.

Q. (By Mr. Tiernan): As against liabilities of—— A. Of \$97,324.65.

The Referee: Go ahead.

The Witness: Leaving a deficit of \$35,617.39.

The Referee: That is as of December 1st and 12th?

The Witness: That's right.

Q. (By Mr. Tiernan): Mr. Yates, did you discuss these figures with Dr. Lands and Miss Feld prior to the hearing? A. I did.

Q. What was the substance of that conversation?

The Referee: I don't see how that is important.

Mr. Tiernan: I want to show that the Doctor admitted——

The Referee: No, that is not material.

(Testimony of Ralph J. Yates.)

It is 12:00 o'clock. [50]

Mr. Tiernan: Does your Honor want to go right on through?

The Referee: We might finish with Mr. Yates, if we can.

Mr. Tiernan: All right. That's all.

Cross-Examination

By Miss Feld:

Q. Mr. Yates, you stated that the figures you were referring to did not take into account the special account of Dr. Lands; is that true?

A. No, I don't believe I said that. If I said that, I didn't mean to. What I meant is this, that the special account of Dr. Lands, I had nothing to check that with. I can see, from what you have introduced here, that all of these items were marked—Dr. Lands transferred it from the special account to the regular account.

The Referee: The answer is that you didn't take that into consideration, because you didn't have any information on the subject, is that right?

The Witness: Yes. The figure I gave took that into account.

The Referee: Where did you get that information?

The Witness: From the books.

The Referee: What did they show?

The Witness: The books show that Dr. Lands passed about 100 transactions—— [51]

(Testimony of Ralph J. Yates.)

The Referee: We are talking about assets.

The Witness: The books show that Dr. Lands put in and took out money on about 100 different occasions, because he had——

The Referee: Can you give us any information as to whether Dr. Lands had any assets that belonged to the corporation on December 1st or 12th, 1952?

The Witness: No. Dr. Lands had no assets.

Q. (By Miss Feld): Mr. Yates, these figures you gave as total assets as of the 1st and 12th of December, can you tell us whether or not the total figure takes into account all the receipts from the peas and tomatoes?

A. Up to that time, yes, that is, according to the books and records.

Q. You haven't any way of telling us at the moment whether the books and records would jibe with the deposit slips that are part of Petitioner's Exhibit 4?

A. Not without checking.

Q. You have no accurate way of knowing what the correct figure is, that your estimate of the assets on these two dates may not be correct?

The Referee: He is going on what the books show. If the books show the contrary, you can have an opportunity to show that. He has given it according to what the books show.

Q. (By Miss Feld): One more question, Mr. Yates. [52] In your opinion, could a layman looking at these books as of a particular date, would he be

(Testimony of Ralph J. Yates.)

able to determine the financial condition of the company? A. No.

Miss Feld: No further questions.

The Referee: Anything further?

Redirect Examination

By Mr. Tiernan:

Q. As a matter of fact, that is generally true of any accounting, isn't it, Mr. Yates? That a layman is not able to——

The Referee: Well, that is unimportant. How does he know? His testimony is from the books, and naturally a layman wouldn't know.

Mr. Tiernan: Thank you, your Honor.

The Referee: Are you through?

Mr. Tiernan: Yes.

The Referee: We will adjourn. But one question that I want to ask is this: Take this agreement, Petitioner's Exhibit 1, Paragraph 3 (a): "The first \$20,000 received or derived or coming in from said crop shall be paid directly to the said Victor George Lands as a return of the new \$20,000 advanced by him."

Evidently that was intended as security. But the fact is he didn't take the first \$10,000. Does that amount to a waiver? You can have your answer ready at [53] 2:00 o'clock.

(Whereupon a recess was taken until 2:00 p.m. of this date.) [54]

Friday, September 11, 1953—2 P.M.

The Referee: All right.

Mr. Tiernan: The first thing I would like to do is file the Amendment.

The Referee: Yes. Have you served a copy on the other side?

Mr. Tiernan: Yes, a copy has been served, and there is a stipulation to the effect that the allegations of the Amendment are denied.

The Referee: All right.

Mr. Tiernan: If the Court please, we would like to offer in these proceedings the report and account of the Receiver, and also the inventory and appraisal, the official appraisal, which is on file, for the purpose of showing that the liquidated value of this estate will not exceed \$28,000.

The Referee: I don't think that is competent. It is too remote.

Mr. Tiernan: It is the only evidence we have to show the liquidated value.

The Referee: You showed by Mr. Yates that the concern was insolvent.

Mr. Tiernan: I wanted to offer that.

The Referee: No.

Mr. Tiernan: All right. Call Mr. [55] Springstead.

WALLACE SPRINGSTEAD

called as a witness on behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Mr. Springstead, what was your position with the company?

A. I was president and manager of the corporation.

Q. Were you familiar with its affairs?

A. Yes, I was.

Q. Directing your attention to the latter part of November, 1952, prior to the time that Dr. Lands withdrew the first \$5000, did you have any conversation with the Doctor with respect to this withdrawal? A. I did, yes.

Q. Tell us where those conversations took place, who, if anyone, was present, and what was said by each of you.

A. I would say most of the conversations were on the telephone between the Doctor and I. The Doctor had borrowed the money from somebody else, and the person he had borrowed the money from was threatening him——

Q. Now, this is the conversation?

A. I am giving the summation of the conversation. And so the Doctor was trying to find a time that was appropriate to withdraw the first \$5000, to quiet his [56] creditors. Upon the withdrawal of either the first or the second \$5000—I am not

(Testimony of Wallace Springstead.)

exactly sure which \$5000 it was—he appeared at the Bank of America and called me and said he was withdrawing the \$5000 from the account. And I kept a running balance on what his account here held, and presumed it was going to be transferred to our account.

The Referee: That isn't conversation. That may go out. All we want is what was said.

The Witness: Between he and I, the conversation was, he wanted to take the \$5000, and I wanted him to put it in the company.

Q. (By Mr. Tiernan): Did you expressly ask him to leave the money in? A. I did.

Q. What did he say?

A. He said he had to have it and he was going to take it.

The Referee: The money was then in the special account, was it?

The Witness: That's right.

Q. (By Mr. Tiernan): Did you tell him what the condition of the company was at that time?

A. I did. I told him our checks would bounce.

Q. What did he say?

A. He said they hadn't been bouncing, and if they did and we went into bankruptcy, he would fix it so I never [57] went into business again.

Q. Then the question of your possible bankruptcy as a result of these withdrawals was discussed by you and the Doctor?

A. I told him that if he took the money out, if he wrote the check to himself instead of to the

(Testimony of Wallace Springstead.)

company, that I would have no choice but to tell the creditors, whom we had been stalling for some time, of the circumstances, and I knew the result would result in bankruptcy, they would file a petition.

Q. Had you been conversing with the Doctor at intervals for the period immediately preceding the withdrawal of the first \$5000?

A. Immediately preceding the withdrawal of the first \$5000 there was no difference of ideas. The Doctor——

Q. You called him and told him——

A. The Doctor was perfectly——

Q. Did you have regular telephone conversations with the Doctor? A. We did.

Q. You requested him to loan the company so much money?

A. I did, and he never objected. He did. He did it every time we asked for it.

Q. About how many times a week did you call the Doctor and talk to him? [58]

A. Sometimes two or three, and sometimes only once. My recollection wouldn't be that close.

Q. Did the Doctor come to San Diego in the period from October to December, 1952?

A. He did whenever it was necessary.

Q. Did he discuss the affairs of the company with you? A. He did.

Q. At the time that the \$5000 was drawn out, that is to say, at both times, was there any corporate meeting or board meeting in connection with

(Testimony of Wallace Springstead.)

that transfer? A. Not to my knowledge.

Mr. Tiernan: I think that is all.

Cross-Examination

By Miss Feld:

Q. Mr. Springstead, isn't it true that this conversation you testified to, the one wherein you told the Doctor that if any money was taken out there might be some possibility of the creditors protesting, isn't it true that that took place after December 12th, after the second \$5000 had been withdrawn?

A. That was the second conversation in that regard. There were three conversations, to be exact.

The Referee: Give us the dates now.

The Witness: On or about—I can only give you on or about. Will that be satisfactory?

The Referee: No. Give it the best you can. [59]

The Witness: The first conversation was on the date of the withdrawal of the second \$5000 check, over the telephone, on a call placed by the Doctor from the Bank of America.

The Referee: The first \$5000?

The Witness: It was either December 1st or December 12th.

The Referee: With relation to that date, when was the conversation?

The Witness: It would be on the withdrawal—either the first or second. I don't remember which one.

The Referee: This conversation was on the withdrawal of the first?

(Testimony of Wallace Springstead.)

The Witness: No. It might have been the second.

The Referee: The second was December 12th.

The Witness: If it is, if it is on the record, it is.

The Referee: You think now that the first one was about December 12th?

The Witness: I wouldn't be able to tell you. It was the first \$5000 or the second \$5000. It is quite a long time.

The Referee: All right.

The Witness: After that there was a discussion with the Doctor in regard to withdrawing another \$10,000, which I objected to because of the condition of the company. [60]

The Referee: What was the date of that; do you remember that?

The Witness: Early in January.

The Referee: Of this year?

The Witness: Yes, sir. Also there was a third conversation, at which I had my attorney present, with respect to this other \$10,000.

The Referee: I don't think that would have any bearing.

The Witness: She asked the question and I was only——

The Referee: I don't think that has any bearing. Go ahead.

Q. (By Miss Feld): Mr. Springstead, to the best of your knowledge, how much money came in from the pea crop after that?

(Testimony of Wallace Springstead.)

A. I would not be able to give you that. The books would reflect it.

Q. Isn't it true that money was coming in for that? A. Yes.

Q. From December 1st on?

A. To the best of my recollection, yes. There was a draft on every car. We were getting advances on every car.

The Referee: Let me ask you this. This agreement—you are familiar with it, aren't you?

The Witness: Yes, I am familiar with it.

The Referee: Petitioner's Exhibit No. 1. [61] That provides that out of the first \$20,000 that comes in, Dr. Lands was at liberty to repay to himself the \$20,000 loan. Do you know why he didn't do that?

The Witness: Yes, I know why.

The Referee: Why didn't he do that?

The Witness: Because there wasn't sufficient funds to operate the company.

The Referee: You mean by that that you wanted him to use the money to operate the company, rather than to pay himself?

The Witness: Yes, sir.

The Referee: Did you have a talk with him about that?

A. Many times.

The Referee: And did he permit you to use the money instead of paying himself?

The Witness: He did.

Miss Feld: I think that is all.

Mr. Tiernan: That is all, thank you.

The Referee: Any other witnesses?

Miss Feld: No. I would prefer to keep Mr. Springstead here, though.

The Referee: Yes. Anything further, Mr. Tiernan?

Mr. Tiernan: I would like to ask Mr. Springstead a few questions that I neglected to ask, if your Honor will indulge me for about three minutes.

The Referee: I will give you two. But we will take a [62] ten minute recess now.

(Ten minute recess.)

Mr. Tiernan: That is all, your Honor. We rest.

Miss Feld: I would like to put Dr. Lands on again.

The Referee: Go ahead.

VICTOR G. LANDS

having been heretofore duly sworn, upon being recalled, testified as follows:

Direct Examination

By Miss Feld:

Q. Dr. Lands, you heard Mr. Yates, the auditor, testify as to the assets and liabilities of the company as of December 1st and December 12th. To the best of your knowledge, there were receipts and proceeds coming in from the crop as of December 1st, and again as of December 12th?

A. To the best of my knowledge, receipts were constantly coming in, and, as cars were being

(Testimony of Victor G. Lands.)

picked and loaded in Baja California, and sold in the East, the advance drafts would be coming in constantly and deposited to my account.

Q. And you knew of these deposits?

A. Yes.

Q. And they are reflected in the check stubs?

A. Yes, and reflected in the ability to withdraw the first \$5000 and the second \$5000. [63]

Q. You heard the conversation Mr. Springstead just testified to, concerned with withdrawal of either the first or second \$5000—he wasn't quite sure when. Do you remember having a conversation with Mr. Springstead about that? A. Yes.

Q. When did that take place?

A. This was on December 12th, or rather, December 12th was—this conversation took place with reference to the second withdrawal. These withdrawals were made with Mr. Springstead's understanding and consent, because it was up to him to deposit the receipts received from the East, and after the first check was withdrawn on the 1st, I questioned him in reference to when it would be possible to withdraw another \$5000 as the receipts were being deposited, and he suggested on or about the 12th. Now, the Saturday before the 12th—I think the 12th was on a Monday—I went down to San Diego with Miss Feld to obtain the money in cash from the Bank of America, and Mr. Jensen, vice president of the Bank of America, or Mr. Barry, who is one of the officers of the Bank of America, was present, either one or both were

(Testimony of Victor G. Lands.)

present. At that particular time I called Wally from the bank, and he was at the office, stating that I was planning to remove another \$5000, and he became quite infuriated and irritated because it was being done two or three days prior to [64] when he anticipated the drafts would be in the bank covering all his current expenses. But there was no question at that particular time of any bankruptcy or any insolvency.

The Referee: That has to go out. It is just what was told to you by Mr. Springstead or anybody connected with the company.

The Witness: Yes.

The Referee: Are you positive that you didn't have any conversation with Mr. Springstead before the 12th?

The Witness: No.

The Referee: Are you positive——

The Witness: I had a conversation.

The Referee: You had a conversation about the withdrawal of your money at the time you took out the first \$5000?

The Witness: No. I mean, there was no objection to that.

The Referee: You had no conversation with him about it?

The Witness: Yes; he knew it was being withdrawn.

The Referee: You mean the first \$5000?

The Witness: Yes.

(Testimony of Victor G. Lands.)

The Referee: Did you tell him about it?

The Witness: Yes.

The Referee: What did he say?

The Witness: I would like to—— [65]

The Referee: What did he say when you told him you were going to take it?

The Witness: It was perfectly all right. The draft would be in the bank and it would be available.

The Referee: Did he say anything about the creditors?

The Witness: No, sir.

The Referee: Did he say anything about creditors or bankruptcy when you drew out the second one?

The Witness: No, sir; emphatically no.

The Referee: Go ahead.

Q. (By Miss Feld): Dr. Lands, with reference to the financial situation of the corporation itself, did you ever see a completed audit or financial statement?

The Witness: No, ma'am.

Q. Did you ever have any conversation with Mr. Springstead concerning a financial statement of the corporation? A. Yes.

Q. Will you tell us when those conversations were and who was present?

A. Well, we had many such conversations, some by telephone and some at meetings where Mr. Elzer and Mr. Springstead and yourself and I were present, and the sum and substance of these con-

(Testimony of Victor G. Lands.)

versations was that we have a most excellent crop of peas in Baja, that they are blooming well, that the market price in the East was excellent, [66] because there were no other crops elsewhere in the United States, and therefore it would bring a high return, that we estimated the number of cars as being approximately 75, at an approximate profit of \$1500 per car, which is in excess of \$100,000.

The Referee: Did you ever look at the books of the corporation along in December, 1952?

The Witness: No.

The Referee: Did you ever look at them at all?

The Witness: No, sir. I took Mr. Springstead's word for the condition of the situation from time to time.

The Referee: Did he tell you anything specific in December about the condition of the corporation?

The Witness: Yes. In late December he expressed concern about the number of cars that were being shipped and loaded. That was in late December.

The Referee: What was his complaint?

The Witness: They weren't reaching his prediction, and that the number of cars actually being shipped fell short of the number he expected to be shipped.

Q. (By Miss Feld): When you speak of late December, when was that?

A. On or about Christmas.

The Referee: What I want to get at is whether

(Testimony of Victor G. Lands.)

anything was said by him to you or anything said by you to Mr. Springstead or anyone at the corporation, between December [67] 1st and December 13th about the financial condition of the corporation. Was anything said? A. No, sir.

Q. (By Miss Feld): Between December 1st and December 13th was anything said about the crops?

A. Yes, they were coming in fine, and the proof was that deposits were being made in the bank. I think the bank statement will show those deposits.

The Referee: What I want to know is what information you got, if any, about the financial condition of this bankrupt between December 1st and December 13th.

The Witness: No information about bankruptcy at all.

The Referee: Information about the financial condition of the corporation, between December 1st and December 13th.

The Witness: Yes. Things were going well; otherwise Mr. Springstead wouldn't have permitted me——

The Referee: Never mind.

The Witness: The only information I received was from Mr. Springstead, and he told me we were shipping the cars and it looked like we would be able to meet our quota. And I kept on badgering him in terms of when could I take my first withdrawal, and he would say, "December 1st would be the proper time." This decision was made in late November. And the decision to withdraw on

(Testimony of Victor G. Lands.)

or about the 12th was made shortly after the first withdrawal.

The Referee: Go ahead. [68]

The Witness: The first I heard of any difficulty was when I attempted to make my third withdrawal.

The Referee: When was that?

The Witness: That was on or about Christmas, in late December.

The Referee: What did you hear at that time?

The Witness: At that particular time, in order to keep whatever crops there were, moving in Baja, Mr. Springstead felt that these funds could not be released, and it was always in terms of the——

The Referee: No. You have answered the question. Anything further?

Miss Feld: Just a minute, your Honor.

Q. (By Miss Feld): Dr. Lands, will you explain to the Court what the reason was for your not withdrawing the first moneys immediately when the first moneys came in?

A. Yes. Those moneys——

The Referee: I don't know that that is a proper question. I have been wondering about this agreement. It is kind of ambiguous. It might be well for me to let you show what the parties intended. It simply says that the first money coming in shall be paid over to him.

Miss Feld: That is exactly what we are trying to show.

(Testimony of Victor G. Lands.)

The Referee: I think the agreement is ambiguous, and I am going to have to let both sides show what the [69] intention of both parties was in this agreement. It raises a lot of questions. Go ahead with your questions.

Miss Feld: Could you read back that question, please?

The Referee: Reframe the question.

Q. (By Miss Feld): I believe I asked you for an explanation of the fact that out of the first money that came into the account, why it was not withdrawn.

A. Yes. The answer is more or less as Mr. Springstead stated. He needed money to keep harvesting the crop.

The Referee: In other words, he requested you to let the company use the money instead of taking it, and you consented?

The Witness: That is correct. And there was a meeting held in San Diego at the offices——

The Referee: When?

The Witness: In November.

The Referee: 1952?

The Witness: Yes.

The Referee: Go ahead.

The Witness: At which meeting Mr. Springstead, Mr. Elzer, Miss Feld and myself were present. And at that particular time Mr. Springstead requested that I withhold withdrawing of moneys until such date as the crop situation was rectified, and I consented reluctantly.

(Testimony of Victor G. Lands.)

Mr. Tiernan: I didn't get the date of that. [70]

The Witness: In November. It was the early part of November.

Q. (By Miss Feld): Was there a specific amount of money that you were supposed to let ride before you would touch the money?

A. Yes. Mr. Springstead wanted another \$15,000 accumulated before I would withdraw any money, and then as soon as those moneys were accumulated I requested Mr. Springstead for the first allotment.

Q. Was that the general agreement?

A. Yes.

The Referee: Of course, a written agreement can be modified by an executed oral agreement.

Miss Feld: Nothing further.

Cross-Examination

By Mr. Tiernan:

Q. Dr. Lands, you testified that at the time you withdrew the first \$5000 you went to the Bank of America in company with your attorney?

A. No, I didn't.

Q. Was that the second time?

A. That's right.

Q. Did you go personally to the bank?

A. Yes.

Q. On the first withdrawal? A. No. [71]

Q. Dr. Lands, you didn't make any notations in

(Testimony of Victor G. Lands.)

the checkbook as to the balance in the account every time you drew a check, did you?

A. No, I did not. I took Mr. Springstead's word that there was a certain amount in the bank, and any time when he requested me to write a check I said, "Have you got that much in the account," and he would say, "Yes, we have some such and such a draft," depending on the cars being shipped to the East.

Q. You can see from this bank statement, referring to the period from December 1 through December 12, that these two items I have checked are the two \$5,000 checks, and you can see, as a result of this withdrawal, the first withdrawal, the bank balance was reduced to \$520, and that, as a result of the second withdrawal, the balance in the bank was only \$11.86.

A. As you go on further, you have that situation existing right from the beginning.

The Referee: How would that affect the situation, if he had a lien on this money?

Mr. Tiernan: If he had a lien on it, it wouldn't affect the situation at all.

The Referee: But until the money came into his hands he had no lien. In other words, the accounts were never assigned, and, even if they had been, there was no compliance with the Code. So if this money didn't get into [72] the special account, how could he have a lien on it?

Mr. Tiernan: I have no further questions in connection with it.

(Testimony of Victor G. Lands.)

The Referee: Now, this money that was withdrawn by the Doctor I don't think comes under Sections 824, 825, and 826 of the Corporation Code. It wasn't a distribution of assets. It was simply a repayment of a loan, out of the special account, on which he claimed a lien. It wasn't a distribution of assets. I am not particularly satisfied that when this money was withdrawn the Doctor might have had reasonable cause to believe that the concern was insolvent when he made this withdrawal.

Mr. Tiernan: As a matter of law, an officer and director is chargeable with knowledge.

The Referee: A man in the position he is in here, he didn't have anything to do with the operation of the corporation. An active officer would be but—Have you got any case on that?

Mr. Tiernan: No. I am preparing to submit a memorandum of law, your Honor.

The Referee: Do you want to argue it now or submit it on briefs?

Mr. Tiernan: I prefer to submit it.

The Referee: It is beginning to look to me that the Doctor is entitled to keep the \$10,000. How much time do you want? [73]

Mr. Tiernan: Who do you want to file the opening brief?

The Referee: Miss Feld should, I think.

Mr. Tiernan: Yes. How much time?

Miss Feld: Ten days.

The Referee: Ten, ten and five.

Mr. Tiernan: That is satisfactory. I just wanted

(Testimony of Victor G. Lands.)

to ask Mr. Springstead whether he has any recollection of this meeting in San Diego.

The Referee: You mean in November?

Mr. Tiernan: Yes.

The Referee: Go ahead.

Mr. Tiernan: Do you have any recollection of it, Mr. Springstead?

The Witness: No.

Miss Feld: I was present at this meeting and will testify to it.

Mr. Tiernan: I will stipulate that you will support that statement.

The Referee: You stipulate that if Miss Feld testified she would testify the same as Dr. Lands regarding this meeting.

Dr. Lands: Mr. Elzer was present too, sir.

Mr. Tiernan: Okay.

The Referee: All right. [74]

Certificate

I, C. W. McClain, hereby certify that on the 11th day of September, 1953, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this 6th day of October, 1953.

/s/ C. W. McCLAIN,
Official Court Reporter.

[Endorsed]: Filed October 8, 1953, Referee. [75]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 115, inclusive, contain the original Petition for Involuntary Bankruptcy; Order of General Reference; Petition to Reclaim Property; Petition for Order to Show Cause re Preference and Fraudulent Conversion; Answer to Petition for Order to Show Cause re Preference and Fraudulent Conversion; Answer to Petition to Reclaim Property; Amendment to Petition for Order to Show Cause re Preference and Fraudulent Conversion; Memorandum of Facts, Law, Points and Authorities; Brief of Trustee in Support of Preference and Fraudulent Conveyance; Reply Brief of Victor G. Lands; Memorandum Opinion re Status of Dr. Victor G. Lands; Two Objections and Corrections to Findings of Fact, Conclusions of Law and Order; Findings of Fact, Conclusions of Law and Order; Petition for Review of Referee's Order of December 22, 1953; Certificate on Review; Petitioner's Exhibit No. 1; Supplemental Certificate on Review; Memorandum; Order Denying Petition for Review

and Affirming Order of Referee; Notice of Entry of Order; Notice of Appeal; Statement of Points on Appeal and Designation of Record on Appeal which, together with Reporter's Transcript of Proceedings on September 11, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of June, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14401. United States Court of Appeals for the Ninth Circuit. Victor G. Lands, Appellant, vs. Kyle Z. Grainger, Jr., Trustee in Bankruptcy of Estate of Universal Produce Company, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed June 24, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14401

VICTOR G. LANDS,

Appellant,

vs.

KYLE Z. GRAINGER, JR., Trustee in Bankruptcy
of the Estate of Universal Produce Company,
Bankrupt,

Appellee.

APPELLANT'S STATEMENT OF POINTS

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant, Victor G. Lands, hereby adopts the Statement of Points Upon Which He Intends to Rely heretofore filed with the District Court of the United States, for the Southern District of California, Central Division, and constituting pages 110 through 112 of the record herein, and hereby designates for printing the following documents on the following pages of the record docketed in the above-entitled court:

* * *

Dated: June 24, 1954.

/s/ VIVIAN M. FELD,
Attorney for Appellant.

[Endorsed]: Filed June 25, 1954.

No. 14402

United States
Court of Appeals
for the Ninth Circuit.

OTIS A. KITTLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

FEB 17 1955

PAUL P. O'BRIEN,

CLERK



No. 14402

United States
Court of Appeals
for the Ninth Circuit.

OTIS A. KITTLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

KENNETH P. DILLON, ESQ.

For Respondent:

EDWARD H. BOYLE, ESQ.

The Tax Court of the United States

Docket No. 35,442

OTIS A. KITTLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1951

June 25—Petition received and filed. Taxpayer notified. Fee paid.

June 26—Copy of petition served on General Counsel.

June 25—Request for Circuit hearing in San Francisco, Calif., filed by taxpayer. 7/5/51. Granted.

Aug. 8—Answer filed by General Counsel.

Aug. 17—Copy of answer served on taxpayer, San Francisco, Calif.

1952

May 31—Hearing set July 28, 1952, San Francisco, Calif.

Aug. 4—Hearing had before Judge Bruce on merits, stipulation of facts filed at hearing, petitioner's brief 9/18/52; respondent's brief 10/20/52; reply 11/10/52.

Aug. 22—Transcript of hearing 8/4/52, filed.

1952

Sept. 15—Brief filed by taxpayer. Copy served.

Oct. 20—Motion for extension to Oct. 27, 1952, to file brief filed by General Counsel. 10/21/52. Granted.

Oct. 27—Answer brief filed by General Counsel.

Nov. 17—Motion for extension to Nov. 28, 1952, to file brief filed by taxpayer. 11/18/52. Granted.

Nov. 28—Reply brief filed by taxpayer. Copy served 12/1/52.

1953

Oct. 19—Findings of Fact and Opinion rendered. Judge Bruce. Decision will be entered under Rule 50. Copy served.

1954

Jan. 7—Respondent's computation for entry of decision filed.

Jan. 8—Hearing set 2/10/54, Washington, D. C., on respondent's computation.

Jan. 26—Consent to respondent's computation for Entry of Decision filed by petitioner.

Jan. 28—Decision entered. Judge Bruce. Div. 6.

Apr. 22—Petition for Review by U. S. Court of Appeals for the Ninth Circuit filed by taxpayer.

May 27—Order extending time to 7/21/54 for filing the record and docketing the appeal, entered.

1954

- June 7—Designation of contents of record on review with service acknowledged thereon, filed by taxpayer.
- June 8—Counter-designation of contents of record on review with proof of service by mail thereon, filed by General Counsel.
- June 17—Proof of service of petition for review filed.
-

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Promulgated October 19, 1953

Petitioner held engaged in regularly carrying on a trade or business, and a net loss of \$14,032.34 realized by him in the calendar year 1947 was attributable to the operation of such business and subject to be carried back to the calendar year 1945 under sections 23(s) and 122, I.R.C.

Amounts received by petitioner in 1947 as payments under a lease of iron ore lands represented royalties payable upon production and not amounts received for the sale of ore in place. Such amounts held to represent ordinary income and not capital gain.

KENNETH P. DILLON, ESQ.,

For the Petitioner.

EDWARD H. BOYLE, ESQ.,

For the Respondent.

Respondent determined a deficiency in the income tax of the petitioner for the calendar year 1945 in the amount of \$160.71. The basic issue involved is whether petitioner is entitled to a net operating loss deduction for the calendar year 1945 under sections 23(s) and 122 of the Internal Revenue Code based on a net operating loss carry-back from the calendar year 1947, and, if so, in what amount. Determination of this basic issue presents the questions (1) whether petitioner's net loss incurred during 1947 in mining exploration and development work, amounting to \$14,032.34, represents a loss incurred by petitioner in regularly carrying on a trade or business within the meaning of section 122(d)(5) of the Internal Revenue Code; and (2) whether amounts received by petitioner in 1947 as payments under a so-called amended lease of mine lands represent capital gain or ordinary income. Certain adjustments made by respondent in determining the deficiency are not in issue.

Findings of Fact

Certain of the facts were stipulated and are so found.

Petitioner is an individual residing in Bishop, California. His return for the period involved, namely, the calendar year 1945, was filed with the collector of internal revenue for the District of Nevada. The petitioner filed an amended income tax return for the calendar year 1945 claiming a net operating loss deduction of \$8,912.05, said claimed deduction being attributable to a net oper-

ating loss carry-back from the calendar year 1947.

As of January 1, 1946, the petitioner was the owner of a $1/63$ interest in certain capital assets, namely, the mineral rights appurtenant to certain Minnesota iron ore properties commonly known as the "Rust Mine Lands." For many years prior to January 1, 1946, the aforesaid properties were operated by Oliver Iron Mining Company, a corporation, as assignee of Lake Superior Consolidated Iron Mines, a corporation, as lessee, under a lease dated October 2, 1899, naming the petitioner's predecessors in interest and certain others as lessors. As of January 1, 1946, the petitioner and other owners of percentage fee interests in the aforesaid properties, as lessors, and Oliver Iron Mining Company, as lessee, executed an amended lease, incorporated herein by reference. By the aforesaid amended lease, petitioner became entitled to receive during the first twenty-year period of the fifty-year extension of the lease from Oliver Iron Mining Company, a $1/63$ of \$10,000,000 or \$158,730.16. Said aggregate amount of \$10,000,000 was stated in said amended lease to be computed at the rate of 50c per ton for the first 20,000,000 tons of iron ore to be mined and shipped by the lessee from the aforesaid properties, payable by quarter annual payments of \$125,000 payable on the twenty-fifth days of April, July, October and January in each year, and continuing to and including January 25, 1966, petitioner's share of said quarter annual payments being $1/63$ of \$125,000, or \$1,984.13. Under the aforesaid amended lease,

the lessee assumed and agreed to pay said quarter annual payments as an unconditional continuing corporate obligation, irrespective of the quantity of iron ore actually shipped from said properties during any year or quarter thereof and not withstanding any termination of the lease, including the right of lessee thereafter to mine or ship ore from, or continue in possession of, said properties. During the calendar year 1947, the petitioner received from Oliver Iron Mining Company amounts which aggregated \$7,936.52, representing his undivided interest in the quarter annual payments under said amended lease. The petitioner's undepleted cost attributable to the aforesaid payments received in 1947 amounted to \$969.40. The petitioner paid or incurred, during the calendar year 1947, as expenses in connection with the aforesaid payments received by him in that year, a total of \$424.54.

During the calendar year 1946, the petitioner commenced and engaged in mining exploration and development work with respect to certain mining properties in the state of Nevada, namely, the "Florence Mine" and the "Richmond Mine" in Nye County, the "Bull Run District Mine" in Elko County, and the "Springmeyer Mine" and "Carbonate Hill Mine" in Douglas County, in connection with which exploration and development work he paid or incurred expenses during 1946 aggregating \$8,197.53, there being no receipts. Petitioner's mining and exploration work with respect to said properties was discontinued within the same year, and at the end of that year he retained no

further interest of any nature whatsoever in said properities. For the calendar year 1946, the petitioner duly filed an income tax return disclosing a net loss from mining exploration in the amount of \$8,197.53 in Schedule C of said return. During the calendar year 1946, petitioner also commenced and engaged in mining and exploration work with respect to three other mines within the state of Nevada, namely, the "Clay Peters Mine," "Gooseberry Mine" and "McCoy Mine," in connection with which he paid or incurred expenses during 1946 aggregating \$404.06. As of the close of the year 1946, petitioner was still engaged in mining exploration and development work with respect to said mines. Said expenses of \$404.06 were capitalized and deferred by the petitioner on his books of account and not deducted in his Federal income tax return for 1946.

During the calendar year 1947, the petitioner commenced and engaged in mining exploration and development work with respect to the "McNamara Mine," "Commodore Mine," "Vista Mine," "McAdoo Mine" and "Wellington Tungsten Mine," all located in the state of Nevada, and the "Lordsburg Mine" located in the state of New Mexico, in connection with which work he paid or incurred expenses during 1947 aggregating \$13,664.32. Petitioner discontinued mining exploration and development work with respect to all said properties and with respect to the three mines referred to above on which work had been commenced and not completed in 1946, within the year 1947, and at the end

of said year retained no interest of any nature whatsoever in said properties. For the calendar year 1947, petitioner duly filed a Federal income tax return disclosing in Schedule C thereof a net loss from mining exploration in the aggregate amount of \$14,032.34, representing the total of the aforesaid amounts of \$404.06 and \$13,664.32, net of gross receipts of \$36.04, said net loss in the amount of \$14,032.34 representing a proper deduction for the taxable year 1947. During said years 1946 and 1947, petitioner's only sources of gross income, other than from mining exploration and development, were dividends, interest, capital losses from security transactions, and the receipts and items referred to above from the Oliver Iron Mining Company.

Petitioner is a mining engineer, having been graduated from the Mackay School of Mines of the University of Nevada. He was in the military service from May 12, 1942, to February 26, 1946. After discharge he established residence in Reno, Nevada, and began looking around for mining properties which might be explored and developed. About July 1, 1946, he employed Victor E. Kral, also a graduate of Mackay School of Mines, on a small salary with the understanding that if anything worth while was found the latter would receive ten per cent of the net profits therefrom. He established and maintained an office in Reno during 1946 and 1947, as Otis A. Kittle, Mining Exploration, a proprietorship. In the beginning petitioner

contemplated limiting his expenditures in this enterprise to approximately \$10,000 but added to this sum as successive properties were examined. Kral acted as business manager and kept records of the company's expenses, such expenses being segregated or allocated for each property explored. Kral also made examinations and samplings of some of the properties. At times when needed, less experienced engineers were also employed by petitioner to assist in this work.

The exploration work conducted by petitioner and Kral during 1946 and 1947 included physical examination, sampling, assays, mapping, diamond drilling, drafting and trenching operations. The equipment used, with the exception of a double drum slusher, was small, portable and suitable only for mine exploration and development work rather than commercial production. Upon abandonment of any particular mining property the equipment being used thereon was moved directly to another property or held at the office in Reno until needed on another property. The properties thus explored by petitioner were usually ones which had previously been the subject of exploration or mining which had been discontinued. Petitioner's arrangements with the property owners were usually verbal, or if written, tentative, providing for a period of 30, 60 or 90 days for examination, sampling and assaying preliminary to the signing of written leases or options if the property appeared sufficiently interesting to petitioner.

It was petitioner's intention, if his exploration

and development work disclosed any property with sufficient possibilities for commercial production to convey his interest to others or to organize a new enterprise with sufficient capital for beneficiation. If the showing was only small he might have attempted to remove the ore and sell it to some custom plant for further processing. In either event he would have continued his exploration and development work looking for additional ore bodies.

Petitioner continued in his exploration and development work until the end of 1949. Kral continued in his employment until March, 1949. There were other concerns in Nevada engaged in exploration and development work as a well-defined activity distinct from commercial production.

Petitioner was engaged in regularly carrying on the trade or business of mine exploration and development during the calendar years 1946 and 1947 and the net loss in the amount of \$14,032.34 incurred by petitioner during the calendar year 1947 was attributable to the operation of such business.

Opinion

Bruce, Judge:

Petitioner claims a net operating loss deduction for the calendar year 1945 under sections 23(s) and 122 of the Internal Revenue Code,¹ based upon a

¹Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

* * *

(s) Net Operating Loss Deduction — For any

net operating loss carry-back from the calendar year 1947. The first question for determination is whether petitioner's net loss incurred during 1947 in mine exploration and development work, amounting to \$14,032.34, represents a loss incurred by petitioner in regularly carrying on a trade or business within the meaning of section 122(d)(5).

It is not disputed that during the calendar year 1947 petitioner suffered a net loss from his mining exploration work in the aggregate amount of \$14,032.34, and that such net loss represented a taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * *

Sec. 122. Net Operating Loss Deduction.

(a) Definition of Net Operating Loss—As used in this section, the term “net operating loss” means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

* * *

(d) Exceptions, Additions, and Limitations—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * *

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions, additions, and limitations specified in paragraphs (1) to (4) of this subsection. * * *

proper deduction for the taxable year 1947. Respondent contends, however, that such loss was not incurred by petitioner in regularly carrying on a trade or business within the meaning of section 122(d)(5). As a basis of his contention respondent argues that it is not possible from the record to ascertain what petitioner's business was, or what course he would have followed if ore had been discovered, so as to realize a profit or income. Assuming petitioner would have actively mined any discovery made or would have leased the mineral rights to third parties, respondent asserts the expenditures incurred in 1947 in connection with the discovery would not have been deductible as operating expenses but, pursuant to the requirements of Reg. 111, section 29.23(m)-15,² would have been capital items recoverable only through deduction for depreciation and depletion, citing Rialto Mining Corp., 25 B.T.A. 980, and G. E. Cotton, 25 B.T.A. 866. Respondent concedes that if it be assumed petitioner would have sold the mineral rights to

²Sec. 29.23(m)-15.

Allowable Capital Additions in Case of Mines—
(a) All expenditures in excess of net receipts from minerals sold shall be charged to capital account recoverable through depletion while the mine is in the development stage. The mine will be considered to have passed from a development to a producing status when the major portion of the mineral production is obtained from workings other than those opened for the purpose of development, or when the principal activity of the mine becomes the production of developed ore rather than the development of additional ores for mining.

third parties, petitioner would be in the business of selling mineral properties and the expenditures incurred in 1947 would have constituted operating expenses rather than the cost of each mine or mineral property.

Petitioner contends, however, that his business consisted of exploring and developing mineral properties as distinct from the business of commercial mining production and therefore that the loss incurred therein represents deductions otherwise allowed by law attributable to the operation of a trade or business regularly carried on within the meaning of section 122(d)(5) of the Internal Revenue Code.

We agree with petitioner's position. That he followed a regular course of action cannot be denied. Beginning in 1946, after his release from the military service, and continuing through 1949, petitioner employed all his business energies and time in the exploration and development of mining properties. He established and maintained an office for such business, kept records of expenditures, and employed others to assist him. His working assets were the \$19,000 or more which he allocated for such work, his engineering abilities, and personal services. The fact that he never realized any income from his activities (except an unexplained item of \$36.04) does not of itself prevent such activities from constituting a trade or business. As respondent on brief has stated, the question of whether or not the net loss incurred in 1947 should be deemed attributable to the operation of a trade or business, can-

not be held to turn upon petitioner's success or failure in discovering mineral properties. Nor do we think it material, under the facts of this case, what course petitioner would have pursued had he found a commercially productive ore body. Both petitioner and Kral testified that had such an ore body been discovered the beneficiation thereof would have been the subject of an entirely new enterprise and that they would have continued in their activities of exploring and developing other ore bodies. Had he discovered an ore body in any of the properties examined worthy of commercial production his interest therein would unquestionably have been capable of evaluation and such evaluation would have been recognized by way of cash, stock, or partnership interest by any company organized to exploit such ore deposits. Such valuation would have represented income of petitioner's business of exploration and development of mineral properties. Petitioner's business was not merely that of a particular venture or development of a particular mining lease as in the Rialto and Cotton cases, *supra*. The various mining properties explored were not isolated transactions but part of his regular business and the losses incurred were from the operation of a business regularly carried on by him. Such losses incurred in 1947 are accordingly eligible for carry-back to the calendar year 1945 under the provisions of sections 23(s) and 122 of the Internal Revenue Code. See Oscar K. Eysenbach, 10 B.T.A. 716; Royal W. Irwin, 37 B.T.A. 51; Henry E. Sage, 15 T.C. 299.

Having determined that the net loss incurred by petitioner during 1947 in mining exploration and development work, amounting to \$14,032.34, represents a loss incurred in regularly carrying on a trade or business and as such eligible for carry-back to the year 1945, it becomes necessary to determine whether amounts received by petitioner in 1947 as payments under a so-called amended lease of mine lands represent capital gain or ordinary income, in order that the amount of net operating loss available for carry-back may be determined.

As of January 1, 1946, petitioner, by succession in interest, was a party to a mining lease dated October 2, 1899. This lease, by its terms, was to run for a period of fifty years and three months, or until January 1, 1950, and provided for certain production and advance or minimum royalties.

The 1899 lease was considered in the case of *Estelle Burt DeVelin, et al., Trustees*, 22 B.T.A. 1400, wherein it was held that the royalty payments were ordinary income and not the proceeds of sale of any part of the land or other capital assets. Royalties paid to petitioner prior to 1946 were reported by him in his income tax returns as ordinary income.

As of January 1, 1946, petitioner and other successors to the original interests of the lessors under the 1899 lease entered into an "Amended Lease" of the Rust Mine Lands with Oliver Iron Mine Company, the successor in interest of the lessee. This amended lease was to run for a period of fifty years from January 1, 1946, and its stated purpose

was "to extend the term of said [1899] mining lease and to make certain other modifications thereof." Petitioner's position is that under the amended lease he, as owner of a 1/63 interest of the mineral rights appurtenant to the Rust Mine Lands, effected a sale of his pro rata share of 20,000,000 tons of ore in place.

The amended lease, which is included in the record by stipulation, is quite lengthy, containing some 56 separate paragraphs. It need not all be here set out, as we are concerned merely with those sections which determine the nature of the instrument and the character of the payments provided to be made, to wit, whether it is a lease of the lands providing for royalty payments to the lessors who, under its terms, retained an economic interest in the minerals to be mined by the lessee, or whether it is a contract of sale of such minerals in place and the payments provided to be made are merely ones in consideration of such conveyance. The pertinent provisions of the lease are as follows:

1. That the Lessors, in consideration of the sum of one dollar (\$1.00) to them paid by the Lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, conditions, and provisions of this lease to be kept and performed by the Lessee, do hereby let, demise and lease unto the Lessee, for the further term of fifty (50) years from and after the first day of January in the year one thousand nine hundred and forty-six, the following described lands and premises in the County of St. Louis and State of Minnesota,

hereinafter referred to as the "Rust Mine Lands," to wit:

* * *

4. The Rust Mine Lands are demised to the Lessee for the purpose of exploring for mining, taking out and shipping therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for) which is or hereafter may be found on, in or under the Rust Mine Lands, with the right to the Lessee to construct all buildings and to make all excavations, openings, ditches, drains, railroads, roads and all other improvements which are or may become necessary or suitable for the mining or removing of the iron ore therefrom and the carrying on of mining operations thereon. The term "merchantable ore" as used in this lease shall be taken to mean such ore as shall be merchantable from time to time as the work of mining progresses.

5. The Lessee hereby covenants and agrees to pay to the Lessors a royalty on all iron ore mined and shipped from the Rust Mine Lands while this lease shall remain in force, as follows:

6. Upon the first twenty million (20,000,000) tons of iron ore mined and shipped by the Lessee from the Rust Mine Lands the royalty shall be at the rate of fifty (50) cents for each gross ton of 2240 pounds avoirdupois.

* * *

9. The Lessee further covenants and agrees that for each year prior to January 1, 1966, it will pay

to the Lessors the sum of Five Hundred Thousand Dollars (\$500,000.00), payable quarterly on the twenty-fifth days of April, July, October and January in each year, irrespective of the quantity of iron ore actually shipped from the Rust Mine Lands during such year or any quarter thereof, and the total amount so paid, including the final payment on January 25, 1966, shall satisfy the royalty of fifty (50) cents per ton on the first twenty million (20,000,000) tons of ore shipped from the Rust Mine Lands.

10. If, prior to January 1, 1966, less than twenty million (20,000,000) tons of ore shall have been shipped from the Rust Mine Lands, the balance of said twenty million (20,000,000) tons of ore, upon which the royalty shall have been paid as above provided, on or before January 25, 1966, may be shipped, without further payment of royalty thereon, at any time thereafter during the existence of this lease; but the shipment thereof shall not be taken to satisfy or affect in any way the minimum requirements after January 1, 1966, hereinafter provided for.

11. If, prior to January 1, 1966, the Lessee shall ship, as it may, more than twenty million (20,000,000) tons of iron ore from the Rust Mine Lands, the Lessee shall pay to the Lessors, in addition to the quarterly payments to be made as aforesaid, the base royalty on all such ore in excess of the said twenty million (20,000,000) tons shipped during each quarter year, payable on the twenty-

fifth day of the month following the end of such quarter; and the excess royalty, if any, thereon, shall be paid on the twenty-fifth day of July of the year following the year in which such ore was shipped.

* * *

47. Notwithstanding any termination of this lease, including the termination of the right of the Lessee thereafter to mine any ore from the Rust Mine Lands, or to ship therefrom any ore theretofore mined, or to continue in possession of the Rust Mine Lands, any unpaid balance of the total amount of Ten Million Dollars (\$10,000,000) payable as royalty on twenty million (20,000,000) tons of ore as aforesaid, shall nevertheless be paid by the Lessee to the Lessors in quarterly installments of One Hundred Twenty-five Thousand Dollars (\$125,000.00) each, on the 25th days of April, July, October and January in each year, until said amount is fully paid; and for an adequate consideration such obligation is hereby assumed and agreed to be paid as a continuing corporate obligation of said Lessee.

* * *

The principle is well settled that the holder of a royalty interest in natural resources possesses an economic interest in the minerals in place. *Palmer v. Bender*, 287 U.S. 551; *Burnet v. Harmel*, 287 U.S. 103; *Murphy Oil Co. v. Burnet*, 287 U.S. 299. It is also well settled that cash bonus payments or advanced royalties when incident to a royalty interest have the same character as royalty payments

made under the contract for mineral extracted. *Burnet v. Harmel*, *supra*; *Bankers' Pocahontas Coal Co. v. Burnet*, 287 U.S. 308; *Herring v. Commissioner*, 293 U.S. 322. The above cited cases determined definitely that such payments represent ordinary income to the lessor, taxable as such, and not capital gain received from the sale of the mineral in place. *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25.

The contract here in question is designated by the contracting parties as a lease, and the payments to be made under its terms are characterized as royalties. Those payments to be made prior to extraction of the mineral are termed prepaid royalties and the payments to be made extend over the term of the lease and under its terms are measured by production. Both the original 1899 lease and the amended lease of 1946 carry the identical provision that

The Lessee hereby covenants and agrees to pay to the Lessors a royalty on all iron ore mined and shipped from the Rust Mine Lands while this lease shall remain in force, * * *

The petitioner's theory is that by paragraphs 9 and 47 of the amended lease the payments agreed to be made are converted from royalty payments to ones in exchange for a transfer of title to 20,000,000 tons of ore in place. With this we do not agree. Paragraph 9 merely obligates the lessee to pay the lessors \$10,000,000 over the first twenty-year period of the lease even though the full amount of 20,000,000 tons of ore is not extracted during

such period. This is merely a provision for minimum royalties. *Bankers' Pocahontas Coal Co. v. Burnet*, supra. This is clear if the paragraph in question is construed, as it must be, with the two following paragraphs, 10 and 11, which provide that if less than the 20,000,000 tons shall have been mined and shipped prior to 1966, the balance of such tonnage may be taken without further payment of a royalty, and that any excess over the 20,000,000 tons mined and shipped by the lessee during the lease period shall carry an additional royalty payment at a specified rate.

We think it clear that these prepaid royalties required of the lessee under the contract are identical in character to the advanced royalties or cash bonus payments involved in *Burnet v. Harmel*, supra, and *Bankers' Pocahontas Coal Co. v. Burnet*, supra.

Petitioner, in support of his position, asserts that under the contract the lessee has bound itself independently under a "corporate liability" to pay the full amount of \$10,000,000 irrespective of the amount of production. On this basis it is argued that the lessor does not here have to look to the actual extraction of the mineral for the recovery of this sum. Similar argument was made and rejected in the cases above cited respecting bonus and advance royalty payments. As was said by the court in *Burnet v. Harmel*, supra:

* * * the payments made by the lessee are consideration for the right which he acquires to enter upon and use the land for the purpose

of exploiting it, as well as for the ownership of the oil and gas; under both the bonus payments are paid and retained, regardless of whether oil or gas is found, and despite the fact that all which is not abstracted will remain the property of the lessor upon termination of the lease.

* * *

Bonus and royalties are both consideration for the lease, and are income of the lessor. We cannot say that such payments by the lessee to the lessor, to be retained by him regardless of the production of any oil or gas, are any more to be taxed as capital gains than royalties which are measured by the actual production. * * *

The effect of paragraph 47 merely makes clear the obligation of the lessee to pay the full amount of the minimum royalty provided even if the lease be terminated. The fact that this liability is specifically provided to be a corporate liability of the lessee is, we think, without any special significance. It would be such a liability in any case where the lessee was a corporation unless by some specific provision of the lease or by act of the lessor the corporation would be exempted from the liability assumed to make full payment of the advance royalties agreed upon.

Petitioner bases his contention upon the decision in *Anderson v. Helvering*, 310 U.S. 404. It is argued that certain of the language used by the court in that case is applicable to the situation here shown to exist. The language in question, however, was

used with respect to a situation entirely different in character to that here presented. There the court had a case of an outright sale and conveyance of property for a fixed consideration of money. This property consisted of an aggregate of certain royalty interests, fee interests and deferred oil payments. There the seller sought depletion allowance upon the purchase price by reason of the fact that it had, under the contract of sale, as security for the payment agreed to be made, retained a lien upon 50 per cent of the proceeds of the production of oil and oil payments and also upon the proceeds of any sale of the properties conveyed in fee. The court held that the seller of the properties had retained no economic interest measured by production, the amount payable to him not being fixed by production of oil and with the possibility that it be satisfied in full from the proceeds of the sale by the purchaser of the properties conveyed in fee.

We think the case of *Anderson v. Helvering*, supra, has no application to the question here. That case was decided subsequent to most of the cases which we have heretofore cited as laying down the rules under which the retention of an economic interest is to be determined. It in no sense purports to limit or restrict the meaning or effect of the court's decisions in those cases, the court having cited them as authority for the conclusion which it reached.

We sustain the respondent in his determination that the amount received by the petitioner as an owner of an interest in Rust Mine Lands and under

the amended lease of January 1, 1946, constitutes ordinary income and not capital gain.

Decision will be entered under Rule 50.

Served October 19, 1953.

The Tax Court of the United States
Washington

Docket No. 35,442

OTIS A. KITTLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the opinion of this Court promulgated October 19, 1953, the respondent, on January 7, 1954, filed his computation under Rule 50 of the Court's Rules of Practice, which computation has been agreed to by the petitioner. In accordance therewith, it is

Ordered and Decided that there is an overpayment of \$2,024.10 in income tax for 1945.

[Seal] /s/ J. GREGORY BRUCE,
Judge.

Entered January 28, 1954.

Served January 29, 1954.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective counsel, that the facts hereinafter stated shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce upon the trial of this case any other and further evidence not inconsistent with the facts herein stipulated.

1. The Petitioner is an individual residing at P.O. Box 478, Bishop, California.

2. The return for the period involved, namely, the calendar year 1945, was filed with the Collector of Internal Revenue for the District of Nevada.

3. The Notice of Deficiency, a copy of which is attached to the Petition on file herein as Exhibit A thereto, was mailed to the Petitioner on March 28, 1951.

4. The Commissioner determined a deficiency in Petitioner's income tax for the calendar year 1945 in the amount of \$160.71, of which the entire amount is in controversy.

5. The Petitioner filed an amended income tax return for the calendar year 1945, claiming a net operating loss deduction of \$8,912.05, said claimed deduction being attributable to a net operating loss carry-back from the calendar year 1947.

6. As of January 1, 1946, the Petitioner was the

owner of a 1/63 interest in certain capital assets, namely, the mineral rights appurtenant to certain Minnesota iron ore properties commonly known as the "Rust Mine Lands."

7. For many years prior to January 1, 1946, the aforesaid properties were operated by Oliver Iron Mining Company, a corporation, as assignee of Lake Superior Consolidated Iron Mines, a corporation, as lessee, under a lease dated October 2, 1899, naming the Petitioner's predecessors in interest and certain others as lessors. A copy of said lease of October 2, 1899, marked Exhibit A, is attached hereto and made a part hereof.

8. As of January 1, 1946, the Petitioner and other owners of percentage fee interests in the aforesaid properties, as lessors, and Oliver Iron Mining Company, as lessee, executed an Amended Lease, a copy of which, marked Exhibit B, is attached hereto and made a part hereof.

9. By the aforesaid Amended Lease, Petitioner became entitled to receive from Oliver Iron Mining Company a 1/63 of \$10,000,000, or \$158,730.16. Said aggregate amount of \$10,000,000 was stated in said Amended Lease to be computed at the rate of 50c per ton for the first 20,000,000 tons of iron ore to be mined and shipped by the lessee from the aforesaid properties, payable by quarter annual payments of \$125,000 beginning January 25, 1946, and continuing to and including January 25, 1966, Petitioner's share of said quarter annual payments being 1/63 of \$125,000, or \$1,984.13.

10. Under the aforesaid Amended Lease, the lessee assumed and agreed to pay said quarter annual payments as an unconditional continuing corporate obligation, irrespective of the quantity of iron ore actually shipped from said properties during any year or quarter thereof and notwithstanding any termination of the lease, including the right of lessee thereafter to mine or ship ore from, or continue in possession of, said properties.

11. During the calendar year 1947, the Petitioner received from Oliver Iron Mining Company amounts under the aforesaid Amended Lease which aggregated \$7,936.52, representing his undivided interest in the aforesaid quarter annual payments under said Amended Lease.

12. The Petitioner's undepleted cost attributable to the aforesaid payments received in 1947 amounted to \$969.40.

13. The Petitioner paid or incurred, during the calendar year 1947, as expenses in connection with the aforesaid payments received by him in that year, a total of \$424.54.

14. During the calendar year 1946, the Petitioner commenced and engaged in mining exploration and development work with respect to four mining properties in the State of Nevada, namely, the "Florence Mine" and the "Richmond Mine" in Nye County, the "Bull Run District Mine" in Elko County, and the "Springmeyer Mine" and "Carbonate Hill Mine" in Douglas County, in connection with which exploration and development

work he paid or incurred expenses during 1946 aggregating \$8,197.53, there being no receipts. Petitioner's mining and exploration work with respect to said properties was discontinued within the same year, and at the end of that year he retained no further interest of any nature whatsoever in said properties. For the calendar year 1946, the Petitioner duly filed an income tax return disclosing a net loss from mining exploration in the amount of \$8,197.53 in Schedule C of said return.

15. During the calendar year 1946, Petitioner also commenced and engaged in mining and exploration work with respect to three other mines within the State of Nevada, namely, the "Clay Peters Mine," "Gooseberry Mine" and "McCoy Mine," in connection with which he paid or incurred expenses during 1946 aggregating \$404.06. As of the close of the year 1946, Petitioner was still engaged in mining exploration and development work with respect to said mines. Said expenses of \$404.06 were capitalized and deferred by the Petitioner on his books of account and not deducted in his Federal income tax return for 1946.

16. During the calendar year 1947, Petitioner commenced and engaged in mining exploration and development work with respect to the McNamara Mine, Commodore Mine, Vista Mine, McAdoo Mine and Wellington Tungsten Mine, all located in the State of Nevada, and the Lordsburg Mine located in the State of New Mexico, in connection with which work he paid or incurred expenses during 1947 aggregating \$13,664.32. Petitioner discon-

tinued mining exploration and development work with respect to all said properties and with respect to the mines referred to in paragraph 15 hereof, within the year 1947, and at the end of said year retained no interest of any nature whatsoever in said properties.

17. For the calendar year 1947, Petitioner duly filed a Federal income tax return disclosing in Schedule C thereof a net loss from mining exploration in the aggregate amount of \$14,032.34, representing the total of the aforesaid amounts of \$404.06 and \$13,664.32, net of gross receipts of \$36.04, said net loss in the amount of \$14,032.34 representing a proper deduction for the taxable year 1947.

18. During said years 1946 and 1947, Petitioner's only sources of gross income, other than from mining exploration and development, were dividends, interest, capital losses from security transactions, and the receipts and items referred to above in paragraphs 11, 12 and 13.

Dated: August 4, 1952.

Respectfully submitted,

/s/ KENNETH P. DILLON,
Attorney for Petitioner.

/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

EXHIBIT A

* * *

Second—The lessee hereby covenants and agrees

to pay to the lessors a royalty on all iron ore mined and shipped from the said lands while this lease shall remain in force, as follows:

For all iron ore mined and shipped * * * after the first day of January, A.D. 1900, the royalty shall be at the rate of twenty-five cents for each gross ton.

* * *

The lessee further covenants that in each year during the existence of this lease, after January 1, 1900, it will mine and ship from the said lands at least two hundred thousand gross tons of iron ore as an agreed minimum output, or, in case in any one or more of such years the lessee shall not actually ship from the demised premises the full quantity of said agreed minimum output, the lessee will, nevertheless, pay to the lessors advance royalty, to be treated and considered as ground rent, in addition to the royalty paid for iron ore actually shipped during that year, such sum as shall, together with the amount paid as royalty for iron ore actually shipped during the said year, amount to Fifty thousand dollars.

* * *

The obligation of the lessee to pay advance royalties as aforesaid shall continue in force without regard to the quantity or quality of iron ore existing on the premises during the full term of this lease or until the same shall be terminated or surrendered or assigned in the manner herein provided; and in case of an assignment of the said lease the obligation to mine or pay for such agreed

annual minimum output, as well as all other provisions of the lease, shall bind the assignee as fully as the lessee is bound hereby.

* * *

EXHIBIT B

Amended Lease
Rust Mine Lands

Estelle Rust, Edgar H. Ailes and Maxine Rust
Muirhead, as Trustees Under the Will of Ezra
Rust, Deceased, and Others,

As Lessors,

—to—

Oliver Iron Mining Company,

As Lessee.

Dated—January 1, 1946.

* * *

Agreement Effective Jan. 1, 1946

Now, Therefore, in consideration of the premises and of the mutual benefits to accrue to each of them by the making of this agreement, the parties hereto hereby agree unto and with each other that said mining lease shall be and is hereby amended as of January 1, 1946, so that said entire lease shall thereafter read as follows:

* * *

Covenant to Pay Royalty

5. The Lessee hereby covenants and agrees to pay to the Lessors a royalty on all iron ore mined

and shipped from the Rust Mine Lands while this lease shall remain in force, as follows:

Royalty on First 20,000,000 Tons

6. Upon the first twenty million (20,000,000) tons of iron ore mined and shipped by the Lessee from the Rust Mine Lands the royalty shall be at the rate of fifty (50) cents for each gross ton of 2240 pounds avoirdupois.

* * *

Quarterly Payments to Jan. 25, 1966

9. The Lessee further covenants and agrees that for each year prior to January 1, 1966, it will pay to the Lessors the sum of Five Hundred Thousand Dollars (\$500,000.00), payable quarterly on the twenty-fifth days of April, July, October and January in each year, irrespective of the quantity of iron ore actually shipped from the Rust Mine Lands during such year or any quarter thereof, and the total amount so paid, including the final payment on January 25, 1966, shall satisfy the royalty of fifty (50) cents per ton on the first twenty million (20,000,000) tons of ore shipped from the Rust Mine Lands.

* * *

Quarterly Payments to Continue Until
\$10,000,000 Has Been Paid

47. Notwithstanding any termination of this lease, including the termination of the right of the Lessee thereafter to mine any ore from the Rust Mine Lands, or to ship therefrom any ore theretofore mined, or to continue in possession of the Rust

Mine Lands, any unpaid balance of the total amount of Ten Million Dollars (\$10,000,000) payable as royalty on twenty million (20,000,000) tons of ore as aforesaid, shall nevertheless be paid by the Lessee to the Lessors in quarterly installments of One Hundred Twenty-five Thousand Dollars (\$125,000.00) each, on the 25th days of April, July, October and January in each year, until said amount is fully paid; and for an adequate consideration such obligation is hereby assumed and agreed to be paid as a continuing corporate obligation of said Lessee.

* * *

Filed at hearing August 4, 1952.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF DECISION OF TAX COURT

Otis A. Kittle respectfully says:

1. He filed his 1945 individual income tax return with the Collector of Internal Revenue for the District of Nevada, within the Ninth Circuit.
2. In said return he claimed a credit for loss carry-back from the year 1947 which credit was disallowed by the Commissioner but was allowed in principle by the Tax Court.
3. In his return for 1947, petitioner claimed that he had sold a capital asset under an agreement with Oliver Iron Mining Company as of January 1, 1946, but the Commissioner and the Tax Court held that the transaction was a lease on a royalty

basis, and the income therefrom in 1947 must be taxed as ordinary income. That item increased the taxable income for the year 1947 and thereby decreased the net loss for the year 1947, and thus decreased the loss carry-back as a credit against 1945 income.

4. Decision of the Tax Court was entered January 28, 1954, as follows:

“It is ordered and decided that there is an overpayment of \$2,024.10 in income tax for 1945.”

5. Petitioner asks review of that order and decision to the extent that the overpayment was limited to \$2,024.10 by reason of the determination by the Tax Court that the income from Oliver Iron Mining Company in 1947 was ordinary income and not thereby treated as proceeds from the sale of a capital asset, as set forth in opinion of the Tax Court promulgated October 19, 1953, (21 T. C. No. 10).

6. Petitioner asks review by the United States Court of Appeals for the Ninth Circuit.

/s/ KENNETH P. DILLON,

Attorney for Petitioner.

Received and filed April 22, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the fore-

going documents, 1 to 13, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" and "Counter-Designation for Record on Review" in the proceeding before the Tax Court of the United States entitled "Otis A. Kittle, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 35442" and in which the petitioner in the Tax Court has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 21st day of June, 1954.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, the Tax Court of the
United States.

[Endorsed]: No. 14402. United States Court of Appeals for the Ninth Circuit. Otis A. Kittle, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed June 24, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14402

OTIS A. KITTLE,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINT TO BE RELIED
ON BY APPELLANT

By the terms of the amended lease of January 1, 1946, the sum of \$7,936.52 received thereunder by appellant in 1947 constituted part of the proceeds from the sale of a capital asset and is not taxable as ordinary income.

Dated: September 30, 1954.

VARGAS, DILLON &
BARTLETT,

By /s/ KENNETH P. DILLON,
Attorneys for Petitioner.

[Endorsed]: Filed October 1, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that:

1. The following provisions may govern the rec-

ord on this appeal in all further proceedings related thereto:

a. Any portions of Exhibits "A" and "B" to the Stipulation of Facts incorporated in the record on review may be considered in their original form to the extent not designated for inclusion in the printed record.

b. The income tax returns constituting respondent's Exhibits C, D and E in the record on review may be considered in their original form without the necessity of reproducing them, the same not having been included in the printed record.

2. The decision of the Tax Court entered January 28, 1954, in this case ordering and deciding that there is an overpayment for 1945 shall be modified by the addition of the following: and that such portion of the tax was paid after the mailing of the notice of deficiency. Section 322(d)(1)(D), Internal Revenue Code of 1939.

Dated: January 10, 1955.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Attorney for Respondent.

/s/ KENNETH P. DILLON,
Attorney for Petitioner.

[Endorsed]: Filed January 12, 1955.

No. 14,402

IN THE

United States Court of Appeals
For the Ninth Circuit

OTIS A. KITTLE,

Appellant,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Upon Appeal from the Tax Court
of the United States.

BRIEF OF APPELLANT.

KENNETH P. DILLON,

VARGAS, DILLON & BARTLETT,

220 South Virginia Street, Reno, Nevada,

Attorneys for Appellant.

FILED

MAR 23 1955

PAUL P. O'BRIEN, CLERK

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No. 14,402

IN THE

**United States Court of Appeals
For the Ninth Circuit**

OTIS A. KITTLE,

Appellant,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Upon Appeal from the Tax Court
of the United States.

BRIEF OF APPELLANT.

JURISDICTION.

This court has jurisdiction under Section 1141 of Title 26 U.S.C.A., now Section 7482 of the Internal Revenue Code of 1954. The tax return by appellant for the year in question was filed with the Collector for the District of Nevada, which is within the Ninth Circuit.

STATEMENT OF THE CASE.

Appellant filed an amended income tax return for 1945 claiming a net operating loss carry-back from the year 1947. That carry-back, in part, grew out of

the treatment given by appellant in the 1947 return to \$7,936.52 received by him from Oliver Iron Mining Company under the terms of an agreement.

Under date of October 2, 1899, a lease for fifty years was made by owners of property in Michigan to a lessee, which later assigned to Oliver Iron Mining Company. It gave lessee the right to mine iron ore on a royalty basis (Exhibit A, attached to stipulation and introduced in evidence. Tr. 31).

On January 1, 1946 appellant, by succession in interest, was one of the owners of a percentage interest in said property and entitled to a portion of the payments under that lease. As of that date, appellant and the other interested persons executed a new contract with Oliver covering the next fifty years, termed "Amended Lease" (Exhibit B, Tr. 33). Pertinent provisions thereof are as follows (Tr. p. 18 et seq.):

"1. That the Lessors, in consideration of the sum of one dollar (\$1.00) to them paid by the Lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, conditions, and provisions of this lease to be kept and performed by the Lessee, do hereby let, demise and lease unto the Lessee, for the further term of fifty (50) years from and after the first day of January in the year one thousand nine hundred and forty-six, the following described lands and premises in the County of St. Louis and State of Minnesota, hereinafter referred to as the 'Rust Mine Lands,' to wit:

* * *

4. The Rust Mine Lands are demised to the Lessee for the purpose of exploring for mining,

taking out and shipping therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for) which is or hereafter may be found on, in or under the Rust Mine Lands, with the right to the Lessee to construct all buildings and to make all excavations, openings, ditches, drains, railroads, roads and all other improvements which are or may become necessary or suitable for the mining or removing of the iron ore therefrom and the carrying on of mining operations thereon. The term 'merchantable ore' as used in this lease shall be taken to mean such ore as shall be merchantable from time to time as the work of mining progresses.

5. The Lessee hereby covenants and agrees to pay to the Lessors a royalty on all iron ore mined and shipped from the Rust Mine Lands while this lease shall remain in force, as follows:

6. Upon the first twenty million (20,000,000) tons of iron ore mined and shipped by the Lessee from the Rust Mine Lands the royalty shall be at the rate of fifty (50) cents for each gross ton of 2240 pounds avoirdupois.

* * *

9. The Lessee further covenants and agrees that for each year prior to January 1, 1966, it will pay to the Lessors the sum of Five Hundred Thousand Dollars (\$500,000.00), payable quarterly on the twenty-fifth days of April, July, October and January in each year, irrespective of the quantity of iron ore actually shipped from the Rust Mine Lands during such year or any quarter thereof, and the total amount so paid, including the final payment on January 25, 1966, shall satisfy the royalty of fifty (50) cents per ton on the

first twenty million (20,000,000) tons of ore shipped from the Rust Mine Lands.

10. If, prior to January 1, 1966, less than twenty million (20,000,000) tons of ore shall have been shipped from the Rust Mine Lands, the balance of said twenty million (20,000,000) tons of ore, upon which the royalty shall have been paid as above provided, on or before January 25, 1966, may be shipped, without further payment of royalty thereon, at any time thereafter during the existence of this lease; but the shipment thereof shall not be taken to satisfy or affect in any way the minimum requirements after January 1, 1966, hereinafter provided for.

11. If, prior to January 1, 1966, the Lessee shall ship, as it may, more than twenty million (20,000,000) tons of iron ore from the Rust Mine Lands, the Lessee shall pay to the Lessors, in addition to the quarterly payments to be made as aforesaid, the base royalty on all such ore in excess of the said twenty million (20,000,000) tons shipped during each quarter year, payable on the twenty-fifth day of the month following the end of such quarter; and the excess royalty, if any, thereon, shall be paid on the twenty-fifth day of July of the year following the year in which such ore was shipped.

* * *

47. Notwithstanding any termination of this lease, including the termination of the right of the Lessee thereafter to mine any ore from the Rust Mine Lands, or to ship therefrom any ore theretofore mined, or to continue in possession of the Rust Mine Lands, any unpaid balance of the total amount of Ten Million Dollars (\$10,000,-

000) payable as royalty on twenty million (20,000,000) tons of ore as aforesaid, shall nevertheless be paid by the Lessee to the Lessors in quarterly installments of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) each, on the 25th days of April, July, October and January in each year, until said amount is fully paid; and for an adequate consideration such obligation is hereby assumed and agreed to be paid as a continuing corporate obligation of said Lessee.”

Appellant contends that the payments received by him in 1947 were not royalty but formed part of the purchase price on a sale of twenty million tons of ore which had been effected under the so-called “Amended Lease” and, therefore, such payments were not ordinary income subject to depletion deduction or credit but were within the provisions of the revenue act covering the sale of capital assets. If he is correct, his loss in 1947 would be greater; his loss carry-back in 1945 would be greater and the tax for 1945 less than if the Commissioner is right in his determination that the payments were royalty.

The Tax Court agreed with the Commissioner.

Other matters were before the Tax Court but they are not involved here.

SPECIFICATION OF ERROR.

The Tax Court erred in determining that the receipts from Oliver Iron Mining Company in 1947

were royalty payments and not payments on the purchase price for twenty million tons of ore.

SUMMARY OF ARGUMENT.

The intention of the parties to the contract of January 1, 1946 entitled "Amended Lease" was to make a sale of twenty million tons of ore and to provide by lease on a royalty basis for the removal of additional ore as desired by Lessee. That intention is so plain that it overcomes any strict construction which might be given to the words "lease" and "royalty" as used in the contract.

ARGUMENT.

Under normal conditions, royalty from leases giving the right to explore for and remove oil, gas, iron ore and similar minerals is ordinary income for tax purposes and lessors are given a percentage deduction for depletion of their property as the mineral is severed from the land. Usually the land has little value and taxpayer's real asset is the mineral deposit. The attention of the courts has been devoted in the past to a consideration of the equitable taxation of the receipts by lessors arising from such leases and the foregoing rule allowing depletion deduction was the result of judicial and, later, statutory determination.

We respectfully submit that the situation now before the court is outside that general or normal rule

and that appellant made a sale of a capital asset, namely, his interest in twenty million tons of ore, in addition to continuing the lease on a royalty basis for whatever ore the Oliver Company might desire beyond the twenty million tons so purchased.

The Supreme Court has said:

“The facts of each transaction must be appraised to determine whether the transferor has made an absolute sale or has retained an economic interest—a capital investment.” (*Kirby Petroleum Company v. Commissioner*, 326 U. S. 599, 606.)

Appellant contends that the facts are these:

The owners of a vast quantity of unmined iron ore sold twenty million tons of it for ten million dollars, payable during twenty years and for that payment the purchaser became individually liable and appellant was not dependent upon ore production for his purchase price.

The remainder of that vast quantity of ore was offered to the same purchaser on a royalty basis, to be paid as ore is mined.

As to the first twenty million tons, the economic interest of appellant passed to the purchaser upon the execution of the agreement. As to ore beyond that tonnage, such economic interest remained in appellant until the ore might be extracted by the lessee. Two separate transactions thus were consummated in one document. The presence of a lease with royalty covering the remainder of the ore in no way qualified the

absolute sale of the twenty million tons. Those two transactions in one agreement have tended to cause confusion in the application of the Revenue Act concerning the money received by the owners for the twenty million tons so sold—outright and forthwith.

If the owners had mined twenty million tons of ore and stored it on the ground they certainly could sell it, in bulk and not in the course of business, for a total consideration based upon a price per ton. That would be a sale of a capital asset and would be entitled to the provisions of the Revenue Act pertaining to that kind of sale. Why should there be a different rule if the ore is unmined? Nobody will disagree that twenty million tons constitute a great quantity—more than would be mined and stockpiled. These parties adopted almost the only available method for such a sale. They could not survey and describe a tract certain to contain that exact amount of ore. If, in addition to the mined ore in the supposition just stated, the owners of that mined ore also possessed a large area of unmined ore of uncertain quality or quantity, which the buyer might want but he did not care to risk an outright purchase at that time, the parties probably would execute a lease on a royalty basis for the unmined ore. Placing the two separate transactions in one contract, covering first the sale and next the lease, might not be the clearest way to record the agreements of the parties but the existence of the rental or royalty transaction could and should not affect the absolute termination of the economic interest of the sellers in the twenty million tons.

Suppose, again, the owner and prospective buyer examined the entire area which the owner possessed (no mining having been done theretofore); they estimated it to contain twenty million tons of ore and they agreed on a sale of that entire area for ten million dollars. That, also, would be a sale of a capital asset. If the contract provided for a price of fifty cents per ton for any excess tonnage which might be mined, the entire transaction would not become thereby a lease with royalty so that the owner would retain an economic interest in any part of the property.

No citation of authority is needed to the effect that agreements are to be construed according to the intention of the parties if that intention can be ascertained from the words used in the contract. Also, where there is doubt and taxation is involved, the construction ought to be favorable to the taxpayer. The name applied to the instrument is not controlling. In *Anderson v. Helvering*, *infra*, the court stated that the decision in a prior case "did not turn upon the * * * formalities of the conveyancer's art". The agreement of 1946 certainly is entitled to be called a lease upon royalty but that term applies to the excess above twenty million tons. As to the first twenty million tons, it was a conveyance which took from the sellers all their economic interest in that property.

The Supreme Court has stated the effect thereof as follows, in *Anderson v. Helvering*, 310 U.S. 404, 84 L.Ed. 1277:

“By an outright sale of his interest for cash, such an owner converts the form of his capital investment, severs his connection with the production of oil and gas and the income derived from production * * * .”

We pause to consider the *Anderson* case. The owners of royalty interests, fee interests and deferred oil payments sold them to purchasers for a sum payable partly in cash at the execution of the contract and partly from one-half of proceeds the purchasers might obtain later from sale of any of the purchased items. The purchasers gave no personal obligation but allowed a lien or claim in favor of the sellers on one-half of the proceeds to be derived from subsequent production of oil and gas and from sales of fee interests. Those facts are weaker than the fact of corporate assumption of general liability existing in the case at bar. In *Anderson's* case the purchase price, except the down payment, was to come entirely out of subsequent production or sales of the property sold. Nevertheless, the court held that sellers had made a sale of a capital asset. The buyers tried to induce the court to decide that part of the subsequent income from production, which was set aside for the sellers as payment on the purchase price, should be taxed as income to the sellers, but the court said it was income to the buyers. In our case the buyer is liable completely apart from the property sold. In the *Anderson* case the Commissioner contended that the court decisions to the effect that royalty and bonus

transactions were income on economic interests should not apply because the seller had more than the oil and gas production to provide payment to him of the purchase price, namely, the seller had a lien on one-half of the proceeds of all sales of both fee and oil and gas. The Commissioner should take the same position here.

The court in the *Anderson* case said, at page 412:

“Oklahoma Company (seller) is not dependent entirely upon the production of oil for the deferred payments; they may be derived from sales of the fee title to the land conveyed. It is clear that payments derived from such sales would not be subject to an allowance for depletion of the oil reserves, for no oil would thereby have been severed from the ground * * * .”

It is clear that payments for twenty million tons in the case at bar are not dependent upon the mining of any ore and do not necessarily come from the proceeds of ore even if that quantity should be mined. Under the usual royalty lease, royalty is paid out of the proceeds of production.

It seems quite settled that a lease on royalty to be paid as the mineral is mined or produced does not result in the sale of a capital asset and that the lessor is entitled to depletion deduction against the proceeds as a fair substitute for treatment accorded one who has sold a capital asset. In the *Anderson* case, supra, immediately following the foregoing quotation the Supreme Court said (repeating the portion quoted above):

“By an outright sale of his interest for cash, such an owner converts the form of his capital investment, severs his connection with the production of oil and gas and the income derived from production and thus renders inapplicable to his situation the reasons for the depletion allowance. ‘The words “gross income from the property,” as used in the statute governing the allowance for depletion, mean gross income received from the operation of the oil and gas wells by one who has a capital investment therein,—not income from the sale of the oil and gas properties themselves.’ ”

The Court determined that the reservation by seller in the *Anderson* case of interests in the oil production and the fee materially affected the transaction and noted that the seller did not depend for the purchase price on oil and gas production alone but had a lien or claim on proceeds from the sale of the fee or part thereof. Here is significant language in the opinion which supports our contention in the case at bar:

“It (the reservation of security) is similar to the reservation in a lease of oil payment rights *together with a personal guaranty of the lessee that such payments shall at all events equal the specified sum.*” (Emphasis added.)

Exactly the situation here! The agreement of 1946 provides:

“47. Notwithstanding any termination of this lease, including the termination of the right of the Lessee thereafter to mine any ore from the Rust Mine Lands, or to ship therefrom any ore theretofore mined, or to continue in possession of the

Rust Mine Lands, any unpaid balance of the total amount of Ten Million Dollars (\$10,000,000) payable as royalty on twenty million (20,000,000) tons of ore as aforesaid, shall nevertheless be paid by the Lessee to the Lessors in quarterly installments of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) each, on the 25th days of April, July, October and January in each year, until said amount is fully paid; and for an adequate consideration such obligation is hereby assumed and agreed to be paid as a continuing corporate obligation of said Lessee."

That is a personal guaranty by the lessee and, we think, effectively takes the case out of the orbit described by the cases relied on by the Tax Court, wherein we find no such personal guaranty.

Quoting again from the Anderson opinion:

"The deferred payments reserved by Oklahoma Company (seller) accordingly, must be treated as payments received upon a sale to petitioners (buyers), not as income derived from the consumption of its capital investment in the reserves through severance of oil and gas."

Which means, of course, that Oklahoma Company, as seller, was not within the provision for depletion deduction but was the seller of a capital asset and the proceeds should be taxed accordingly.

In *Kirby Petroleum Company v. Commissioner*, 326 U.S. 599, 90 L.Ed. 343, the court said, at page 603:

" * * * only a taxpayer with an economic interest in the asset, here the oil, is entitled to the depletion (citing cases). By this is meant only that

under his contract he must look to the oil in place as the return of his capital investment. The technical title to the oil in place is not important."

In our case, appellant does not look to or depend upon the ore for his sale price; he looks to the corporation purchaser and he can institute an action in assumpsit any time the prescribed payments are not forthcoming to him. Upon a judgment, execution may proceed against the twenty million tons or any other asset of the purchaser. If mining operations cease at any time, the sellers are not affected as to the ten million dollars. How, then, can appellant obtain depletion under the language we have just quoted from the *Kirby* case? If he cannot get depletion and if he cannot (under the decision of the Tax Court) come under the provisions for sale of capital assets, he is surely in a bad way and obtains no credit whatever for his capital investment with respect to the twenty million tons.

Turning again to the *Kirby* case, we find that the court interpreted its decision in the *Anderson* case, as follows:

" * * * we held the operator liable as a purchaser because the seller was not 'entirely dependent' upon the oil production for his purchase price. This gave the operator the benefit of the applicable depletion."

Therefore, if the seller is not entirely dependent upon the oil production for his purchase price, he has sold a capital asset.

The "personal guaranty" feature appeared in *Helvering v. Elbe Oil Land Development Company*, 303

U.S. 372, 82 L.Ed. 905, where Elbe sold all his right, title and interest in oil and gas property and the purchaser agreed to make periodic payments of stated amounts and also to give Elbe one-third of the net profits resulting from operations. Elbe tried to claim depletion credit against the operation income but the court denied the claim. The language of the agreement was very clear that a sale had been intended but, we think, not more clear than the agreement in our case when carefully read and construed. As to the sharing of the production income, the court said, at page 375:

“We are unable to conclude that the provision for this additional payment qualified in any way the effect of the transaction as an absolute sale *or was other than a personal covenant of the (buyer)*. * * * In this view, neither the cash payments nor the agreement for a share of subsequent profits constituted an advance royalty or a ‘bonus’ in the nature of an advance royalty, within the decisions recognizing a right to the depletion allowance with respect to payments of that sort. Such payments are made to the recipient as a return upon his capital investment in the oil and gas in place. (citing cases) Payments of the purchase price which are received upon a sale of oil and gas properties are in a different category. The words ‘gross income from the property,’ as used in the statute governing the allowance of depletion, mean gross income received from the operation of the oil and gas wells by one who has a capital investment therein, — not income from the sale of oil and gas properties themselves. (citing cases) We conclude that as respondent disposed

of the properties, retaining no investment therein, it was not entitled to make the deduction claimed for depletion." (Emphasis added.)

We should not forget that the original document executed in 1899 was properly a lease for fifty years and no sale was then contemplated except as the ore was mined. As the term approached completion, the parties desired a renewal, — plus a new feature. The latter was an outright sale. Beyond that sale there was a continuation of the leasing privilege, to be paid as ore is mined. Perhaps we would have phrased the amending document in a different fashion, but no matter what other words might be changed to more clearly indicate a sale, no words could be plainer than those in paragraph 47 to give what the original lease did not contain, namely, a liability for the purchase of ore entirely apart from the mining of that ore.

We contend that appellant disposed of his share of twenty million tons of ore and took for that a personal covenant of the buyer. Under the foregoing language, he cannot claim depletion and must be entitled to treat the transaction as a sale of a capital asset.

Dated, Reno, Nevada,

March 23, 1955.

Respectfully submitted,

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No. 14402

In the United States Court of Appeals
for the Ninth Circuit

OTIS A. KITTLE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 5-26) are reported at 21 T. C. 79.

JURISDICTION

This appeal involves the liability for federal income taxes for the calendar year 1945 of a taxpayer residing at Bishop, California, who filed his returns for the year in question with the Collector of Internal Revenue for the District of Nevada. The statutory notice of deficiency was mailed to the taxpayer on March 28, 1951. (R. 27.) Within ninety days thereafter, on June 25, 1951, he filed a petition for redetermination with the

Tax Court, pursuant to Section 272 of the Internal Revenue Code of 1939. (R. 3.) Thereafter, on January 28, 1954, the Tax Court entered its decision. (R. 26.) The petition for review by this Court of the Tax Court's decision was filed on April 22, 1954. (R. 35-36.) Jurisdiction is conferred upon this Court by Section 7482(a) of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court was correct in holding that amounts received by the taxpayer in 1947 as payments under a lease of iron ore lands were royalties, taxable as ordinary income, and not proceeds from the sale of ore in place, constituting capital gains, thus diminishing the amount of the net operating loss for that year which the taxpayer is entitled to carry back to the taxable year 1945.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts, substantially as found by the Tax Court (R. 6-8) and referred to in its opinion (R. 17-21), are as follows:

The taxpayer is an individual residing in Bishop, California. On January 1, 1946, he owned a 1/63 interest in the mineral rights appurtenant to certain Minnesota iron ore properties commonly known as the "Rust Mine Lands." For many years prior to January 1, 1946, these iron ore properties were operated by Oliver Iron Mining Company, a corporation, as assignee of Lake Superior Consolidated Iron Mines, a corporation, as les-

see, under a lease dated October 2, 1899, naming the taxpayer's predecessors in interest and certain others as lessors. (R. 6, 7.)

The taxpayer and the other owners of percentage fee interests in the iron ore properties, as lessors, entered into an amended lease, as of January 1, 1946, whereby they leased the "Rust Mine Lands" for a term of fifty years thereafter to the Oliver Iron Mining Company, as lessee, for the purpose of its conducting mining operations thereon. (R. 7, 18-19.) The amended lease, in pertinent part, provided as follows (R. 7, 19-21):

5. The Lessee hereby covenants and agrees to pay to the Lessors a royalty on all iron ore mined and shipped from the Rust Mine Lands while this lease shall remain in force, as follows:

6. Upon the first twenty million (20,000,000) tons of iron ore mined and shipped by the Lessee from the Rust Mine Lands the royalty shall be at the rate of fifty (50) cents for each gross ton of 2240 pounds avoirdupois.

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9. The Lessee further covenants and agrees that for each year prior to January 1, 1966, it will pay to the Lessors the sum of Five Hundred Thousand Dollars (\$500,000.00), payable quarterly on the twenty-fifth days of April, July, October and January in each year, irrespective of the quantity of iron ore actually shipped from the Rust Mine Lands during such year or any quarter thereof, and the total amount so paid, including the final payment on January 25, 1966, shall satisfy the royalty of

fifty (50) cents per ton on the first twenty million (20,000,000) tons of ore shipped from the Rust Mine Lands.

10. If, prior to January 1, 1966, less than twenty million (20,000,000) tons of ore shall have been shipped from the Rust Mine Lands, the balance of said twenty million (20,000,000) tons of ore, upon which the royalty shall have been paid as shown above provided, on or before January 25, 1966, may be shipped, without further payment of royalty thereon, at any time thereafter during the existence of this lease; but the shipment thereof shall not be taken to satisfy or affect in any way the minimum requirements after January 1, 1966, hereinafter provided for.

11. If, prior to January 1, 1966, the Lessee shall ship, as it may, more than twenty million (20,000,000) tons of iron ore from the Rust Mine Lands, the Lessee shall pay to the Lessors, in addition to the quarterly payment to be made as aforesaid, the base royalty on all such ore in excess of the said twenty million (20,000,000) tons shipped during each quarter year, payable on the twenty-fifth day of the month following the end of such quarter; and the excess royalty, if any, thereon, shall be paid on the twenty-fifth day of July of the year following the year in which such ore was shipped.

* * * * *

47. Notwithstanding any termination of this lease, including the termination of the right of the Lessee thereafter to mine any ore from the Rust Mine Lands, or to ship therefrom any ore thereto-

fore mined, or to continue in possession of the Rust Mine Lands, any unpaid balance of the total amount of Ten Million Dollars (\$10,000,000) payable as royalty on twenty million (20,000,000) tons of ore as aforesaid, shall nevertheless be paid by the Lessee to the Lessors in quarterly installments of One Hundred Twenty-five Thousand Dollars (\$125,000.00) each, on the 25th days of April, July, October and January in each year, until said amount is fully paid; and for an adequate consideration such obligation is hereby assumed and agreed to be paid as a continuing corporate obligation of said Lessee.

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During the calendar year 1947 the taxpayer received from Oliver Iron Mining Company amounts which aggregated \$7,936.52, representing his undivided interest in the quarter annual payments under the amended lease. The taxpayer's undepleted cost attributable to these payments was \$969.40, and he paid or incurred expenses in connection with the payments totaling \$424.54. (R. 8.) He filed his return for the calendar year 1945 with the Collector of Internal Revenue for the District of Nevada, and thereafter filed an amended income tax return for that year, claiming a net operating loss deduction of \$8,912.05, the claimed deduction being attributable to a net operating loss carry-back from the calendar year 1947. (R. 6-7.) In his return for 1947 the taxpayer treated the payments received in that year from the Oliver Iron Mining Company under the amended lease of January 1, 1946, as gain from the sale of a capital asset, instead

of as royalties, thus reflecting for that year, and carrying back to 1945, a larger net operating loss than the Commissioner deemed proper. The Commissioner determined a deficiency against the taxpayer in the amount of \$160.71 for the calendar year 1945. (R. 6.) The taxpayer petitioned the Tax Court for a redetermination. (R. 3.) The Tax Court sustained the Commissioner on this issue and entered its decision accordingly (R. 25-26), from which the taxpayer brings the instant appeal (R. 35-37).

SUMMARY OF ARGUMENT

The Tax Court properly concluded that the January 1, 1946, agreement with the Oliver Iron Mining Company was a mining lease under which the taxpayer retained an economic interest, and not a sale of iron ore in place. Not only is the agreement termed an "Amended Lease" and couched in consistent terminology throughout, but the substance of its provisions testifies fully to the accurateness of its entitlement. The fundamental difference between a mining lease and a conveyance in sale of minerals in place is that the predominating purpose of the former is to secure the exploitation and development of property, and it merely conveys privileges directed to that end. The grant in the instant agreement is a limited one for the purpose of exploring for, mining, taking out, and shipping merchantable iron ore from the Rust Mine Lands, which clearly characterizes it as a mining lease and not a conveyance of minerals. It has been decisively settled that the retention by a lessor of a right to royalties constitutes an economic interest in the minerals in place, rendering the proceeds from the production of the minerals ordinary income and enti-

ting him to a depletion deduction. Here the taxpayer retained a royalty on all iron ore mined and shipped during the term of the amended lease.

The taxpayer points to the provisions in the agreement requiring the lessee to pay the minimum sum of \$500,000 per year during the first twenty years of the lease, regardless of the amount of iron ore actually shipped from the premises during any year, in satisfaction of royalties of 50 cents per ton on the first 20,000,000 tons of ore shipped, and despite any termination of the lease foreclosing the rights of the lessee thereunder. His position that as a consequence of these provisions there was a transfer of his economic interest in 20,000,000 tons of iron ore in place to the lessee upon the execution of the agreement, is without merit. The possibility under the agreement that the lessee, though he must pay the royalties on the first 20,000,000 tons of ore in any event, may nevertheless not be entitled to the ore because of a termination of the agreement, is totally inconsistent with any suggestion that the taxpayer sold and conveyed all his economic interest to the lessee.

In addition to the fact that the payments involved here are royalties at a specified rate of 50 cents per ton, the amended lease provides that if the lessee has not mined and shipped the minimum of 20,000,000 tons of ore within the first 20 years, it may take the remaining tonnage during the life of the lease without further royalties, but additional royalties are prescribed for ore taken in excess of the minimum tonnage. It is evident, therefore, that these royalty payments were intended to be measured by production in the ordinary course of mining operations under the amended lease,

and the requirement that royalties be paid upon the minimum tonnage in all events is merely a provision for minimum royalties. This is a feature commonly found in mining leases which, it is clear from the cases involving such leases, does not convert what would otherwise be a mining lease into a sale of ore in place. Moreover, as the lower court pointed out, the provision for minimum royalties is in principle the same thing as a provision for advance royalties or cash bonus payments which, it has been decisively settled, are, like royalties, consideration for the lease taxable as ordinary income to the lessor, and not capital gains. The Tax Court, therefore, was correct in regarding the payments here involved as ordinary income for the purpose of computing the taxpayer's net operating loss for the year 1947 and the resulting carry-back deduction allowable for the taxable year 1945.

ARGUMENT

The Tax Court Was Correct in Holding That the Amounts Received by the Taxpayer in 1947 as Payments Under the Amended Lease of the Rust Mine Lands Were Royalties Taxable as Ordinary Income, and Not Capital Gains

The vital question presented on this appeal is whether the amounts received by the taxpayer in 1947 under the amended lease entered into as of January 1, 1946, with the Oliver Iron Mining Company constituted royalties received pursuant to a mining lease under the terms of which the taxpayer retained an economic interest, as the Tax Court held (R. 22-23), or proceeds from the sale of minerals in place, as the taxpayer contends (Br. 6-7). If they were royalties, the amounts constituted ordinary income, but if they were proceeds from the sale of a capital asset, they

constituted long-term capital gains. Treatment of the amounts as ordinary income results in the taxpayer's having a smaller net operating loss for the taxable year 1947 available for carry-back to the taxable year 1945 than if such amounts are treated as long-term capital gains. Section 122(a), Internal Revenue Code of 1939 (Appendix, *infra*). Consequently, the net operating loss deduction for 1945 allowable to the taxpayer under Section 23(s) of the 1939 Code (Appendix, *infra*) is smaller than the amount to which he claims to be entitled.

It should be noted at the outset that the same considerations determine both to whom income derived from the production of minerals is taxable and to whom a deduction for depletion is allowable. *Anderson v. Helvering*, 310 U.S. 404, 407. It follows that one who has an economic interest in minerals requiring him to treat the income from production as ordinary income is entitled to recover his investment through a deduction for depletion. On the other hand, one who has divested himself of any economic interest through a sale retains no depletable economic interest. See Section 23 (m), Internal Revenue Code of 1939, and Section 29.23(m)-1, Treasury Regulations 111 (both Appendix, *infra*).

It is clear from a consideration of the terms of the agreement of January 1, 1946, between the taxpayer and the Oliver Iron Mining Company that the Tax Court was amply warranted in considering that agreement as a mining lease rather than a sale, and therefore the payments made to the taxpayer in 1947 under that agreement were properly held to be royalties rather than capital gains. To begin with, the agreement is entitled "Amended Lease" (R. 17, 33), and the ter-

minology employed by the parties throughout is wholly consistent therewith. Of course, the name used by the parties in describing the contract does not necessarily determine its nature. *Hamme v. Commissioner*, 209 F. 2d. 29, 32 (C.A. 4th), and cases there cited, certiorari denied, 347 U.S. 954. However, in the instant case, the substantial provisions of the agreement fully indicate the correctness of its entitlement. As the Tax Court indicated in *West v. Commissioner*, 3 T.C. 431, 453, affirmed, 150 F. 2d 723 (C.A. 5th), certiorari denied, 326 U.S. 795, rehearing denied, 327 U.S. 815, and 328 U.S. 877 and 881, the most essential difference between a lease and a conveyance of minerals is that the predominating purpose of a lease is to secure the exploitation and development of property for the purposes set out in the transferring instrument. The significant and inescapable fact is that the express purpose of the agreement under consideration clearly indicates that it is a lease and contains no provisions which characterizes it as a sale. Thus, as stated in the agreement, the *lease* of the Rust Mine Lands is a limited one "for the purpose of exploring for mining, taking out and shipping therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for) which is or hereafter may be found on, in or under the Rust Mine Lands". (R. 19.) Directly apropos, in the light of the purpose thus expressed, is *Burnet v. Harmel*, 287 U.S. 103, 107, wherein the Supreme Court stated:

Moreover, the statute speaks of a "sale," and these leases would not generally be described as a "sale" of the mineral content of the soil, using the term either in its technical sense or as it is com-

monly understood. Nor would the payments made by lessee to lessor generally be denominated the purchase price of the oil and gas. By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill, and produce oil and gas if found. Such operations with respect to a mine have been said to resemble a manufacturing business carried on by the use of the soil, to which the passing title of the minerals is but an incident, rather than a sale of the land or of any interest in it or in its mineral content. *Stratton's Independence v. Howbert*, 231 U.S. 399, 414, 415; see *Von Baumbach v. Sargent Land Co.*, 242 U.S. 503, 521.

Certainly, the amended lease contains no expression whatever indicating any intent by the parties that the taxpayer convey any part of his fee interest in the Rust Mine Lands beyond the mere granting of mining privileges. Moreover, irrespective of legal ownership, it is quite clear that the taxpayer retained an economic interest since he specifically retained (R. 19, 22) "a royalty on *all* iron ore mined and shipped from the Rust Mine Lands" while the amended lease should remain in force. (*Italics supplied.*) It is settled that the retention of a right to royalties constitutes an economic interest in the minerals in place. *Palmer v. Bender*, 287 U.S. 551, 558. Indeed, it is decisively established that a reservation of even a much less direct interest than the right to royalties constitutes the retention of an economic interest in minerals in place. In *Kirby Petroleum Co. v. Commissioner*, 326 U.S. 599, which involved the payment of royalties, a bonus

and percentage of net profits, it was held that all these payments were subject to depletion and that the right to even net profits constituted an economic interest. This holding was further expanded upon by *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25, in which it was held that the right to a share in net profits, even without royalties or bonuses, constitutes an economic interest.

The taxpayer's position, as the Tax Court noted (R. 22), is based upon a consideration solely of paragraphs 9 and 47 of the amended lease, divorcing those paragraphs from the context and so conveniently ignoring other limiting provisions of the agreement which so plainly reveal it to be a lease of mining rights and not an instrument of sale. Paragraph 9 provides that the lessee pay the lessors \$500,000 each year during the first 20 years of the lease, regardless of the amount of iron ore actually shipped from the Rust Mine Lands during any year, such payments to be in satisfaction of "the royalty of fifty (50) cents per ton on the first twenty million (20,000,000) tons of ore shipped from the Rust Mine Lands." (R. 20.) Paragraph 47 requires that the lessee pay any unpaid balance of the total of \$10,000,000 payable as royalty on 20,000,000 tons of ore, by payments in the amounts and at the times specified in the amended lease, "Notwithstanding any termination of this lease, including the termination of the right of the Lessee thereafter to mine any ore from the Rust Mine Lands, or to ship therefrom any ore theretofore mined, or to continue in possession of the Rust Mine Lands". (R. 21.)

The taxpayer apparently takes the position that these provisions provide for a sale of his interest in

20,000,000 tons of iron ore in place to the Oliver Mining Company. We believe that, without more, paragraph 47 completely belies the taxpayer's claim that (Br. 7) "As to the first twenty million tons * * * [his] economic interest * * * passed to the purchaser upon the execution of the agreement." That paragraph discloses that, while the lessee is required to pay royalties on 20,000,000 tons of ore, nevertheless there exists a distinct possibility under the agreement that in the event of termination of the lease the lessee might never be able to get all or a part of the ore. This is wholly inconsistent with any suggestion that there was a transfer of taxpayer's "economic interest" in such ore, but, to the contrary, is plainly indicative of the actualities, namely, that the agreement, as it purports to be, is merely a lease of mining rights, and not a sale of minerals.

Furthermore, it is perfectly clear that the payments here sought to be treated as gain from a sale were intended by the parties, in the ordinary course of mining under the lease, to be measured by the production and shipment of ore. Paragraph 6 of the amended lease specifically provides for a royalty at the rate of fifty cents per gross ton upon the first 20,000,000 tons of ore mined and shipped from the Rust Mine Lands, and paragraphs 10 and 11 provide that in the event of the mining and shipment of less than 20,000,000 tons of ore during the first twenty years of the lease, the balance of that tonnage may be taken without further payment of royalties during the life of the amended lease, and additional royalties must be paid upon any excess over that tonnage at a specified rate. (R. 19, 20.) Viewed in the light of these provisions, it is clear be-

yond controversy that the requirement of the payment of prescribed royalties upon the first 20,000,000 tons of ore in all events, whether or not such tonnage is actually mined and shipped, is nothing more or less than a provision for minimum royalties, as the Tax Court correctly concluded. (R. 23.)

It is appropriate to observe here that, as the taxpayer points out (Br. 16), this "Amended Lease" is in the nature of a renewal of a prior mining lease entered into in 1899 for a term of fifty years upon the same iron ore properties. (See Ex. A.)¹ As the Tax Court noted (R. 17), the 1899 lease was considered in the case of *DeVelin v. Commissioner*, 22 B.T.A. 1400, 1405, wherein it was held that payments under the lease were royalties, constituting ordinary income, and not the proceeds of a sale of any part of the land or other capital assets. The taxpayer fails to point out any significant departure, in the amended lease, from the 1899 lease which would call for a different result here. All of the limiting features which so clearly denominate the agreement under consideration a mining lease and not a sale were present in the 1899 agreement, and the 1899 lease also contained a provision for minimum royalties. (R. 31-33; Ex. A.) The amended provision for minimum royalties, upon which the taxpayer relies, thus merely represents a change in degree, not in kind.

A provision for the payment of minimum royalties in mining leases is a circumstance which frequently has

¹ This exhibit, except for the brief portion included in the record (pp. 31-33), along with a considerable part of the provisions of the "Amended Lease" here involved, was not printed in the interest of minimizing the size of the printed record, the parties having stipulated (R. 38-39) that the unprinted portions of these exhibits may be considered in their original form.

been present in the litigated cases, the decisions in which negative any suggestion that the inclusion of such a provision suffices to convert a lease of mining rights into an agreement of sale. Thus, in *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, the Supreme Court dealt with mining leases which provided for the exploring for, mining and removing of merchantable ore which might be found on the leased premises during the periods named, usually fifty years, in which the lessees agreed to mine and ship a certain specified minimum quantity of ore at a specified royalty, which minimum royalty was payable in any event, as is the case here. The question arose whether the moneys received by the landowners under the leases constituted gross income, or whether they represented, in whole or in part, the conversion of the investment of the owners from ore into money. The Court held that the leases in question were not equivalent to the sales of property and that the moneys paid by the lessees to the owners were not converted to capital but were rents and royalties and, as such, were income properly included in computing their taxes under the applicable corporation tax law.² In *United States v. Biwabik Mining Co.*, 247 U.S. 116, the Supreme Court had before it a lease for a term of fifty years and three months to explore for, mine, and remove the merchantable iron ore which might be found upon the lands involved for a specified royalty per ton. The lessee agreed to remove at least 300,000 tons of ore annually and the specified royalty was payable in any event. The deposit of the ore on

² It is noted that the Court cited with approval (p. 518) decisions of the Supreme Court of Minnesota expressly denying the conclusion that such leases were merely conveyances of the ore in place.

the leased premises was of such character that its quality and quantity were capable of determination with extraordinary accuracy by drilling and shafts. The Court held that the lease involved was not a conveyance of the ore in place, notwithstanding the fact that it could be measured with substantial accuracy, but was a grant of the privilege of entering upon, discovering, and developing and removing the minerals from the land, and that the lessor's receipts constituted ordinary income subject to taxation under the applicable corporation tax Act, and not capital gains.

Likewise, *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, involved mining leases of iron ore lands containing minimum royalty provisions. The Court held (p. 371) that the leases involved did not constitute a conveyance of ore in place.³ There was also a provision for the payment of minimum royalties in the mining lease involved in *Bankers Coal Co. v. Burnet*, 287 U. S. 308, in which it was held that the royalties received by the lessor did not constitute payments for capital assets. Recently, the Fourth Circuit in *Hamme v. Commissioner*, 209 F. 2d 29, certiorari denied, 347 U. S. 954, which involved mining leases similarly providing for (p. 31) "A minimum of \$10,000 in royalties * * * to be paid in every six months regardless of sales", stated (pp. 34-35):

The minimum requirement was a minimum payment of royalties under the contract, derived from

³ This case involved the question whether the lessee was nevertheless entitled to a depletion allowance in determining its income under Section 12(a) of the Revenue Act of 1916, c. 463, 39 Stat. 756. The Court held, notwithstanding that there was no conveyance of ore in place, that the lessee was entitled to the allowance of depletion upon its interest.

mining operations, and obviously compelled Haile Mines to exploit the minerals on penalty of default and loss of the entire property. It is clear that the impelling motive in the negotiations was the development and operation of potentially productive tungsten properties which petitioners themselves were financially unable to develop. Under such circumstances, we can only agree with the Tax Court that the provisions of this agreement weigh heavily in favor of a leasing arrangement, *West v. Commissioner*, 5 Cir., 150 F. 2d 723, and payments received thereunder were normal income.

Moreover, it is perfectly evident that the provision for minimum royalties involved here is, in principle, precisely the same as the provision for advanced royalties or cash bonus payments involved in *Burnet v. Harmel*, 287 U. S. 103; *Murphy Oil Co. v. Burnet*, 287 U. S. 299; and *Bankers Coal Co. v. Burnet*, *supra*, as the Tax Court pointed out. (R. 23.) In rejecting arguments similar to those advanced by the taxpayer here, the Court stated in *Burnet v. Harmel*, *supra* (pp. 111, 112):

* * * the payments made by the lessee are consideration for the right which he acquires to enter upon and use the land for the purpose of exploiting it, as well as for the ownership of the oil and gas; under both the bonus payments are paid and retained, regardless of whether oil or gas is found and despite the fact that all which is not abstracted will remain the property of the lessor upon termination of the lease.

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Bonus and royalties are both consideration for the lease and are income of the lessor. We cannot say that such payments by the lessee to the lessor, to be retained by him regardless of the production of any oil or gas, are any more to be taxed as capital gains than royalties which are measured by the actual production. * * *

It is submitted that the foregoing decisions are dispositive of the issue which the taxpayer brings here.

The taxpayer offers ^{no} ~~on~~ authority to sustain his contentions. His heavy reliance (Br. 9-13) upon *Anderson v. Helvering*, 310 U. S. 404, is misplaced, since that case is inapplicable here for the reason that it involved an outright sale and conveyance of oil properties, including the fee interest, for a specified money consideration. The Court there held that the seller of the properties, who was seeking a depletion allowance upon the payments of the purchase price, had retained no economic interest measured by production, the amount payable to him being fixed without reference to the amount of the production of oil and with the possibility that it might be satisfied in full from the proceeds derived through a sale by the purchaser of the properties which were conveyed in fee. Similarly, in *Helvering v. Elbe Oil Land Co.*, 303 U. S. 372, cited by the taxpayer (Br. 14-16), there was an absolute sale divesting the taxpayer of all economic interest in oil properties, as a consequence of which he was denied any depletion deduction. Likewise, *Kirby Petroleum Co. v. Commissioner*, 326 U. S. 599, 603, referred to by the taxpayer (Br. 13-14) lends no support to his position.

With respect to the taxpayer's arguments based upon various suppositions and hypotheses (Br. 8-9) under

which he urges that a sale rather than a lease would result, it is sufficient, without entering into useless controversies as to the correctness of his assumptions, merely to point out that what he "*could* or *could not* grant does not control the nature of what he *did* grant." *Burkett v. Commissioner*, 31 F. 2d 667, 668-669 (C.A. 8th), certiorari denied, 280 U. S. 565. It is unequivocally clear here that the taxpayer merely granted a lease of mining rights and not a conveyance in sale of minerals, as the Tax Court properly determined.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Assistant Attorney General.

ELLIS N. SLACK,
HILBERT P. ZARKY,
WALTER AKERMAN, JR.,
Special Assistants to the Attorney General.

APRIL, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(m) *Depletion*.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *. In the case of

leases the deductions shall be equitably apportioned between the lessor and lessee. * * *

* * * * *

(s) [As added by Sec. 211 (a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction*.—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122. (26 U. S. C. 1952 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Sec. 150(a)(1), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions*.—As used in this chapter—

* * * * *

(4) *Long-term capital gain*.—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(26 U. S. C. 1952 ed., Sec. 117.)

SEC. 122 [As added by Sec. 211(b), Revenue Act of 1939, *supra*, and amended by Sec. 105(e)(3) (A), Revenue Act of 1942, *supra*]. **NET OPERATING LOSS DEDUCTION.**

(a) *Definition of Net Operating Loss*.—As used in this section, the term “net operating loss” means the excess of the deductions allowed by this chap-

ter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

* * * * *

(26 U. S. C. 1952 ed., Sec. 122.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(m)-1. *Depletion of Mines, Oil and Gas Wells, Other Natural Deposits, and Timber; Depreciation of Improvements.*—Section 23(m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from

production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest.

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No. 14,402

IN THE

United States Court of Appeals
For the Ninth Circuit

OTIS A. KITTLE,

Appellant,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Upon Appeal from the Tax Court
of the United States.

REPLY BRIEF OF APPELLANT.

KENNETH P. DILLON,

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Respondent is wrong in saying (Br. p. 13) that "it is perfectly clear that the payments here sought to be treated as gain from a sale were intended by the parties, in the ordinary course of mining under the lease, to be measured by the production and shipment of ore." We think the opposite is the fact. The payments in question (year 1946) were fixed in dollars in the amended lease, whether or not ore would be produced and shipped in that year. Such payments constituted parts of the purchase price for mining rights to remove a stated tonnage of ore, namely, twenty million tons. We respectfully submit that it is not a minimum royalty.



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As we understand minimum royalty provisions in mining leases, the penalty for a lessee's failure to pay the minimum royalty is loss of the lease; there is no right of action by the lessor against the lessee for the unpaid portion of the minimum royalty. Therefore, a minimum royalty provision is clearly distinguishable from the personal and continuing corporate liability under our lease. Lessee in our case is bound to pay whether it keeps or loses the lease, and such obligation subjects all other assets of lessee to the danger of execution at the instance of lessors.

There is another distinction between a minimum royalty clause and the provision in our lease. Under our lease, mineral rights to twenty million tons have been sold by lessors to lessees for ten million dollars. Suppose it is discovered that twenty million tons of ore do not exist in the leased premises or that much less than such tonnage is commercially usable to justify the cost of mining it. As we see it, lessee is still absolutely bound to pay the total of ten million dollars. In that event, the cost of a ton of the mined ore is not fifty cents, (treated on a royalty basis) but ten million dollars divided by the number of tons actually mined and removed. So, it cannot be said that the term "royalty" is appropriate when referring to the twenty million tons or to the payments made in 1946 or any other year for part of the twenty million tons.

We agree with respondent (Br. p. 10) that the name used by the parties in describing the contract

does not necessarily determine its nature. Although paragraph 6 of the amended lease (Tr. p. 34) refers to royalty on the first twenty million tons, the intention of the parties as shown by the other provisions of the lease seems clear to the effect that the ten million dollars is an amount of money payable without regard to royalty.

There are obvious differences between the 1899 lease and the 1946 amended lease. The first lease contained a clause requiring lessee to mine and ship 200,000 tons annually or to pay as "advance royalty, to be treated and considered as ground rent" a sum which added to the royalty on mined ore would make \$50,000. Failure to do so would be only a cause for termination. There was no personal or continuing corporate liability to pay and, moreover, such payment was stated to be ground rent. That first lease also provided that it could be terminated by the lessee on notice of thirty days and there was no provision to permit lessors to seek payment of that "ground rent" from other corporate assets. How, then, can respondent say (Br. p. 14) that appellant has failed to point out any significant departure in the amended lease, from the old 1899 lease, which would call for a result differing from the Tax Court's conclusion in *DeVelin v. Commissioner*, 22 B.T.A. 1400?

Respondent suggests (Br. p. 13) the possibility that in event of termination of the lease the lessee might never be able to get all or a part of the ore. Surely that possibility cannot have any bearing here favorable

to respondent. There is no provision in the amended lease that makes it impossible for lessee to mine and ship the entire twenty million tons. Lessee is liable unquestionably for the ten million dollars. Failure to take the full tonnage will not be due to any act of lessors but will be solely attributable to lessee itself and it will not be because of any retention by lessors of title or economic interest. If it should be that the entire twenty million tons are not mined and taken by lessee, it will be because lessee elects to abandon something it has already purchased or there is not that much merchantable ore. Such abandonment is not unknown to the law.

In the cases cited by respondent there was no provision in the lease similar to these words in our lease: "such obligation is hereby assumed and agreed to be paid as a continuing corporate obligation of said lessee." In those cases the lessor looked to the ore and the royalty due upon its extraction from the ground. That distinction is pointed out in the *Anderson* and *Elbe* cases, discussed in our opening brief.

Dated, Reno, Nevada,

May 4, 1955.

Respectfully submitted,

KENNETH P. DILLON,

VARGAS, DILLON & BARTLETT,

Attorneys for Appellant.

IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA	}
<i>Appellant</i>	
vs.	
ROBERT H. H. SUGDEN AND JEAN S. SUGDEN	
	<i>Appellees</i>

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court,
District of Arizona

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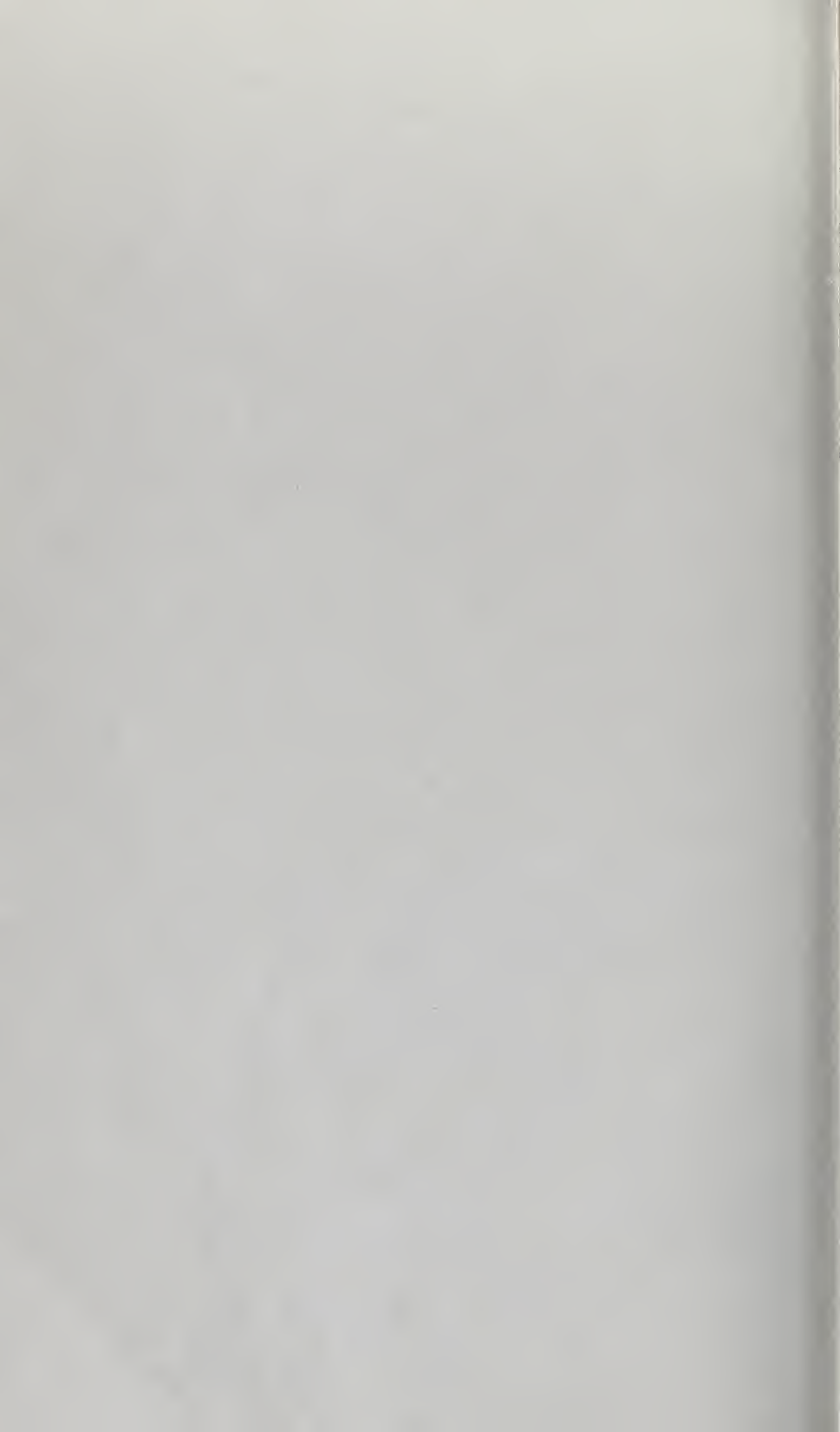


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IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA
Appellant

vs.

ROBERT H. H. SUGDEN AND
JEAN S. SUGDEN *Appellees*

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the
District of Arizona

JURISTICTIONAL MATTERS

The defendants, Robert V. H. Sugden and Jean S. Sugden, husband and wife, were indicted on a charge of violating 18 U.S.C. 371 (conspiracy); and the defendant, Robert V. H. Sugden was also indicted on a charge of violating 8 U.S.C. 1324(a)(3) (concealing aliens illegally within the United States). The United States District Court for the District of Arizona had jurisdiction by virtue of 18 U.S.C. 3231 and that Court had venue under Rule 18, Federal Criminal Rules, due to the fact that the acts stated in the indictments are alleged to have occurred with the District of Arizona.

This Court has jurisdiction under the provisions of 28 U.S.C. 41, 1291, and 1294 and under 18 U.S.C. 3737 because this is an appeal from a final decision by the

District Court dismissing the indictments in these cases and no direct review by the Supreme Court is authorized under 18 U.S. 3731.

These two cases have been ordered consolidated by this Court for purposes of this appeal because the issues are common to both cases (T.R. 84).

STATEMENT OF FACTS

The defendants entered pleas of not guilty to the indictments ,and the cases (C-11,554 and C-11,555) were consolidated for trial (T.R. 15). Prior to the trial of the cases, defendants moved to suppress Government evidence obtained through radio monitoring (T.R.10-13). The District Court ordered a preliminary hearing on the Defendants' Motion to Suppress Evidence.

At the preliminary hearing the evidence offered showed that Robert J. Stratton, an Assistant Engineer with the Federal Communications Commission, on orders from the Washington Office made an investigation of a suspected illegal use of radio in the vicinity of Yuma, Arizona (T.R. 34). On the 4th, 9th, 10th and 18th of September, 1953, Mr. Stratton monitored the radio messages from the defendants' radio station (T.R. 35-37), and the suspicion of an illegal use of the radio was confirmed (T.R. 39). The defendants were not advised that their radio messages were being monitored, nor was any attempt made to secure their consent for such monitoring (T.R. 36). Transcripts were made of the monitored messages, and these transcripts were sent to Washington (T.R. 38). Copies of the transcripts were made available to the United States Immigration Service. Mr. Stratton acknowledged that he had testified before the Grand Jury which indicted the defendants concerning the substance of conversations monitored by him (T.R. 41), and that he had conversations with the United States Attorney concerning the

testimony which he would give at the trial. Counsel for the Government stated that they would rely on Strat-to's testimony in a trial of the indictments.

Horace Billingsley, Lawrence Thomas Gerhart, and Robert F. Sommers, former employees of the defendants testified that they had been questioned by the United States Attorney or Immigration Agents, and that transcriptions of radio broadcasts involving defendants were used in the questioning. Both Gerhart and Sommers testified before the Grand Jury concerning the suspected activities of the defendants.

Robert and Jean Sugden both testified that they placed their reliance on a representative of Motorola Co. in matters concerning radio licensing and they were not told that they could not use the radio. Robert Sugden identified Exhibit 3 as his station license, which was issued to him to operate a radio station for farming purposes. Both defendants stated that they had received their operators' licenses on September 17, 1953, and both identified their operators' licenses (T.R. 66 and 73, Exhibits 1 and 2).

Theodore Kieling, a radio technician in Yuma, Arizona then testified that he checked the defendants' radio and warned them against using the radio without an operator's license, and he even gave them forms to fill out for their operators' licenses.

The District Court held that the interception by the Government of the radio messages of defendants was unlawful, and the Court ruled that all testimony or information gained from that source should be suppressed (T.R. 79). The Court, on motion of defendants, dismissed the indictments (T.R. 80). On May 5, 1954 the Court signed and filed a formal written order suppressing evidence which the Government gained from monitoring the broadcasts of the defendants, and dis-

missing the indictments on the grounds that the indictments were obtained by the Grand Jury's use and consideration of illegally obtained information and evidence, and the further grounds that the Government must use illegally obtained evidence to establish its case against the defendants (T.R. 22-25).

SPECIFICATION OF ERRORS

The appellant relies upon the following errors as a basis for this appeal:

1. The District Court erred in ruling as unlawful the interception of the defendants' radio messages by an engineer of the Federal Communications Commission acting for the United States Government (T.R. 79).

2. The District Court erred in ruling that evidence obtained through monitoring of the defendants' radio messages by the United States should be suppressed (T.R. 25 and 79).

3. The District Court erred in dismissing the indictments against the defendants (T.R. and 80).

SUMMARY

The issues presented in this appeal are of vital importance to the future successful operations of the Federal Communications Commission in its control of radio broadcasting, and the decision of this Court on the issues presented will materially affect future federal law enforcement. The contentions which the Government presses in this appeal are basically these: that the Federal Communications Commission, through its agents, has the power and authority by law to monitor the radio broadcasts of private citizens; that information gained through the Federal Communications Commission monitoring may be used either by the Federal

Communications Commission investigating and prosecuting a violation of the Communications Act, or by any other Federal Agency in a criminal investigation within its jurisdiction; and lastly, that the protections provided by the Communications Act are not available to an individual who broadcasts in violation of the provisions of the Act.

ARGUMENT

The defendants by their motion to suppress evidence (T.R. 10-12) argued that the interception of their radio broadcasts by the Government constituted an unlawful search and seizure in violation of the protections of the Fourth Amendment to the Federal Constitution, and such interception also constituted a violation of Section 605 of Title 47 (The Federal Communications Act of 1934).

The Government believes that it is well established that the interception of conversations whether by wire or air is not a violation of the Fourth Amendment. This Court in the famous case of *Olmstead vs. U. S.*, 19 F. 2d.843; affirmed 277 U.S. 438, held that the tapping of defendant's telephone wires was not a violation of his constitutional rights. The Supreme Court in affirming this Court in the *Olmstead* case held that the tapping of telephone wires was not a search nor seizure, but a mere use of the sense of hearing.

In *Goldman vs. U. S.*, 316 U. S. 129, the Supreme Court reaffirmed and adheared to the principles stated in the *Olmstead* case concerning the Fourth Amendment.

It is therefore the contention of the Government in this case that no constitutional protection of the defendants was invaded. What was done in this case cannot be distinguished from what was done in the *Olmstead* case or the *Goldman* case. Here there is no showing of an invasion of the defendants' dwelling or office, nor is

there any seizure by the Government of the defendants' property. There was merely a listening or overhearing of the defendants' voices, as they were projected through the air which, as the cited cases hold, is neither a search nor a seizure.

The Government believes, however, that the main contention of the defendants is that they are entitled to the protection of Section 605 of Title 47, and that Federal agents violated Section 605 by monitoring the radio broadcasts of the defendants; hence, all evidence and information so gained must be suppressed, and the Government forbidden to make use of such information in a criminal trial against the defendants.

Section 605 states in part:

“ and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person;”

In support of their contention that Section 605 forbids the use of monitored radio information the defendants cited to the learned Trial Judge the following Supreme Court cases:

Nardone vs. United States, 302 U. S. 379

Weiss vs. United States, 308 U. S. 321

Nardone vs. United States, 308 U. S. 338

Goldstein vs. United States, 316 U. S. 114

All of the above cited cases dealt with the problem of tapping telephone wires by Federal Agents to gain evidence for a criminal case. The first *Nardone* case held that Section 605 forbade wire tapping by all persons including Federal Agents and that evidence obtained by Federal Agents by tapping telephone wires was not admissible in Federal Court. The *Weiss* case

and the second *Nardone* case reaffirmed the position of the court that wire tapped evidence was not admissible in a Federal Court against the sender, and the Supreme Court further held that the Government could not make use of such information gained by wire tapping in order to establish a case against the sender. The last important case on the subject, *Goldstein vs. United States*, *supra*, held that the use of wire tapped information to induce a party to testify in a criminal case would not render such testimony so procured inadmissible against a defendant not a party to the message.

In the case at issue the defendants argued before the trial court that their situation is directly in point with the wire tapping cases cited above due to the fact that Section 605 applied to both radio and telephone. The evidence offered by defendants shows that their radio conversations were listened to and that use of such conversations was made in questioning witnesses, presenting the case to the Grand Jury, and preparing for trial.

Notwithstanding the seeming similarity in facts between the wire tapping cases and the case at issue, the Government contends that there are certain distinguishing features in this case which were not present in the cited cases. First, the medium used by the defendants is different than that used in the cited cases, for in the present case the defendants made use of radio broadcasting which is a strictly regulated medium requiring licensing and specific fields of use; whereas the medium of telephonic communication in the cited cases is public in character with little or no regulation on the sender. Second, the Federal Agents who made the interceptions of radio messages in this case are agents of the Federal Communications Commission, an agency of the United States, which the Government contends has authority to intercept radio

messages and make use of information gained therefrom. Lastly, the defendants in their operations were violating the provisions of the Communications Act, the very Act under which they seek protection.

In order to properly decide the issues in this case certain sections of the Communications Act must be called to the Court's attention. While the defendants may claim the protection of Section 605, it must be remembered that that section is but a part of the entire Act, and for a proper construction of the part, the whole must be considered.

United States vs. Alpers, 338 U. S. 680, 684

Adler vs. Northern Hotel C., 175 F 2d 619, 621

Elizabeth Arden Sales Corp. vs. Gus Blass Co. 150 F. 2d. 988, 993

Marshal vs. Andrew F. Mahoney Co., C.C.A. 9, 1932 56 F. 2d. 74, 78

The Communications Act of 1934 is a hybrid. By that Act Congress established a comprehensive system for the regulation of communication by wire and radio, and in the new Act Congress created the Federal Communications Commission to which it entrusted authority previously exercised by several other agencies. *Scripps-Howard Radio, Inc. vs. Federal Communications Commission*, 316 U. S. 4. It is noteworthy that among the articles of equipment which Congress directed to be turned over to the new agency, the Federal Communications Commission, was all equipment including monitoring radio stations of the Federal Radio Commission. 48 Stat. 1102, 47 U.S.C. 603(b)(1). This section standing alone would have little force, but Congress also gave the Federal Communications Commission the power to make such expenditures from appropriations for obtaining land, for constructing, and for maintaining such radio monitoring stations, as may

be necessary for the execution of the functions vested in the Commission. 47 U.S.C. 154(g).

It is the contention of the Government that these cited sections of the statute would be sufficient to establish the authority of the Federal Communications Commission to monitor radio broadcasts of private individuals and to make use of the information gained from such monitoring.

The Supreme Court gives support to the view that the Federal Communications Commission must be able to listen to radio broadcasts and make use of the information it gains therefrom when the Court in *National Broadcasting Co. vs. United States*, 319 U. S. 190 at 215, stated:

“The Act itself establishes that the Commission’s powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.”

Section 303 of Title 47 setting forth the powers and duties of the Commission adds further weight to the position that Congress intended that the Commission should monitor radio broadcasting and make use of such information. Of particular importance is subsection (n) of Section 303 in which it is stated that the Commission shall:

“Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.”

But, as the defendants argued in the District Court, conceding that the Commission may monitor radio broadcasts, the sole use which may be made of such information is in matters directly within the jurisdiction of the Commission; the Commission may not turn over such information as it gained by monitoring to any other Federal Agency for use by that agency. The defendants argued that the protection of Section 605 would be destroyed if the Commission can lend its information to other agencies. Before answering the contentions of the defendants, the Government believes that it is well to point out the extremes which may occur under the defendants' position. If the argument of defendants is followed we may have this situation: A foreign agent residing within the United States makes use of a short wave radio to send secret defense information of the United States to his foreign government; the Federal Communications Commission discovers this plot by listening to the broadcasts. According to defendants such an individual could be prosecuted for broadcasting without a license or some other related violation of the Communications Act, but the information gained by the Federal Communications Commission could not be used by the Justice Department in a prosecution for espionage. The Government believes that Congress in-

tended no such result when it enacted the Communications Act.

It is true that Section 605 sets up a broad protection for those who make use of wire and radio communication, but the purpose of that section is to protect the means of communication and not the secrecy of the conversation. *Goldman vs. United States, supra*, at page 133.

To promote the purposes of the Communications Act Congress created the Federal Communications Commission. To that body Congress gave broad powers which included not only powers exercised by previous agencies but also additional power over wire and radio communications. 47 U.S.C. 151. In Section 303(n) of the Act Congress gave the Commission the authority to inspect radio installations to ascertain whether in construction, installation, and operation they conform not only to the rules and regulations of the Commission, but whether they also conform to the provisions of any Act. It is the position of the Government in this appeal that such a delegation of power to the Commission also gives that agency the power by implication to make available to another Federal Agency information which the Commission has secured through an inspection carried on by monitoring the operation of a radio station. This position is based on the proposition that a statutory grant of power carries with it, by implication, everything necessary to carry out that power and make it effectual and complete. *United States vs. Jones*, 204 F.2d. 745 at 754 C.C.A. 7 (1953). If the argument offered by the defendants were adopted the Commission would be in the absurd position of being able to discover violations of Acts other than the Communications Act but not being able to divulge the information to the proper Federal Agency. Such an absurd position was not intended by Congress, nor will this Court place such

a construction on the Act when a reasonable interpretation will not do violence to the language of the Act and will effectuate the intent of Congress.

United States vs. Raynor, 302 U. S. 540, at 547

Haff vs. Yung Poy, C.C.A. 9, 1933, 68 F. 2d. 203 at 205.

Chester N. Weaver Co. vs. Commissioner of Internal Revenue, C.C.A. 9, 1938, 97 F. 2d. 31 at 33

The Government contends that the protections set forth in Section 605 are not destroyed by the construction which is placed on the sections outlined heretofore. Section 605 protects an individual in the authorized use of radio communication, but the Federal Communications Commission has the duty of protecting the public's interest in radio communication. A harmonious construction of the entire Act would establish Section 605 as protecting the sender of a radio message from unauthorized interception and divulgence of the radio message, but all *radio* communications would be subject to the power of the Commission to monitor broadcasts for the protection of the national defense and welfare, and the Commission would have the power to make use of the monitored radio information itself or turn it over to another Federal Agency for its use. This construction gives full effect and meaning to the whole Act.

There remains one last point to be considered in the defendants' claim of protection under Section 605. Does the protection of Section 605 cover the defendants when they were unlicensed operators and using radio broadcasting for an illegal purpose? It is the Government's contention that the answer to the question must be, No.

Section 301 of the Act provides, in part, that no person shall use or operate any apparatus for the transmission of signals by radio within any state when the effect

of such use extends beyond the borders of said state, except in accordance with the Act and with a license in that behalf issued under the Act. Section 309(d) of the Act provides, in part, that a station license shall be subject to the terms designated in the license and operated in the manner authorized in the license. By the provision of Section 318 of the Act, an operator's license is required for the operation of radio apparatus licensed under the Act.

The defendants secured a radio station license (Ex. 3) providing for the use of radios on their farm vehicles to assist in their farming operations (TR 67 and Ex. 3). The station license was issued August 27, 1953 (Ex. 3), but the defendants did not receive their operators licenses until September 17, 1953 (TR 47, 68, 74, and Exs. 1 and 2). In the period from August 27 to September 17 the defendants operated the station even though they had no license. Of more consequence is the fact that the station was used for an illegal purpose, namely, to warn field foreman of the approach of immigration officers so that illegal immigrants could be hidden from detection.

The defendants now claim that the Communications Act, which they flagrantly violated, protects them in their illegal use of their radio. The Government contends that Congress intended no such illogical position. Before the defendants can claim the rights given by the statute, they must perform the duties required by that statute. This they failed to do.

This Court, in *Casey vs. United States*, C.C.A.9, 191 F. 2d 1, reversed on other grounds 343 U. S. 808, held that Section 605 refers to communications over licensed facilities. In the *Casey* case, this Court stated at page 4:

“There is no merit to appellants’ contention that the trial court erred in admitting in evidence the substance of radio messages between appellants.

§605 of the Act, 47 U.S.C.A. 605, which prohibits the interception and divulgence of communications without the consent or approval of the sender, refers to communications over licensed facilities. The appellants were unlicensed operators transmitting voice messages over an unlicensed station, without call letters, on a portion of the band reserved for Morse Code operations. The protections of the Act were never intended for, nor do they cover, such communications which are themselves illegal."

It is the position of the Government that the reasoning of this Court in the *Casey* case was sound. Good sense and logic support this position that licensed facilities are the object of the Act's protection. To adopt a different view would place Congress in the position of establishing a policy throughout a statute and then in one section provide for the obstruction of that policy. No court will approve such a construction when a sensible reading of the entire act shows the true intent of the lawmakers.

United States v. Raynor, supra.

Haff v. Yung Poy, supra.

Chester N. Weaver Co. v. Commissioner of Internal Rev., supra.

Ford Motor Co. v. Mahone, 205 F 2d 267, 272.

Burcham v. J. P. Stevens & Co., 209 F 2d 35, 40.

Swan Island Club v. Yarbrough, 209 F 2d 698, 701

CONCLUSION

The Government respectfully submits that the District Court erred: (1) in holding that the evidence which the Government gained by monitor was illegally obtained; (2) in ordering the monitored radio information suppressed; and (3) in ordering the indictments against defendants dismissed. The judgment and ruling of the District Court should be reversed, with appropriate instructions directing a trial on the merits.

Respectfully submitted,

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United States Attorney.

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Assistant U. S. Attorney.

No. 14405

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN,

Appellees

*Appeal from the United
States District Court for
the District of Arizona*

APPELLEES' REPLY BRIEF

SNELL & WILMER

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Attorneys for Appellees

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SUPPLEMENTAL FACT STATEMENT

Appellants' fact statement is, in the main, correct. However, it unfairly slants the effect of certain evidence bearing upon the intent of appellees in operating their station prior to the time their operators' license arrived.

At all times involved the station was duly licensed and appellees held operators' licenses on the date of the third and

last "listening in" by the witness for the Government, Mr. Stratton.

Appellees purchased their radio equipment through "Bud" Bridges, Motorola salesman and technician for the area (T.R. 62). Appellees were completely unfamiliar with Federal Communications law and regulations and, respecting the outstanding position of Motorola in that field, looked to Bridges for direction and guidance (T.R. 62, 63, 64, 65, 70, 71, 72, 73). Bridges obtained their station license for appellees. Appellees inquired of Bridges as to their need for an operators' permit in June when the station was ordered and he advised them not to worry, he (Bridges) would take care of it when the time came (T.R. 63, 71); that no examination was required (T.R. 63). After the station was in operation Bridges informed appellees they would need operators' permits and gave them some forms to fill out and send in (T.R. 64, 71). The station was then in operation in appellees' home where Jean Sugden took care of it while attending to her general household duties. (T.R. 71, 72). Bridges at no time advised appellees that the station should not be operated until their operators' licenses arrived and he was present while the station was being operated. (T.R. 64, 65, 72). Actually this type of permit is a mere formality issuing upon application as of course, without examination, provided the applicant is a citizen, has no felony history and indicates he or she is familiar with the rules and regulations (T.R. 48, 45). Appellees' applications for these permits were received September 9th, but, being incomplete, were returned and the actual permits were not recieved by appellees until September 17th, the day before the last "wireless tapping" by the witness Stratton (T.R. 46, 47, 68).

The fact statement that the witness Kieling warned appellees against use of the radio is unfounded and unfair. In fact, in July, before the station was even licensed he told them how to hook it up temporarily for use without any warning against use (T.R.

76, 77). All this witness testified was that in September he gave Mrs. Sugden forms for the permits — and told them the completion report could not be filled out since they did not have their operators' permits (T.R. 76, 77, 78). He was the radio technician regularly employed in the office of the Sheriff of Yuma County checking out their station — it was then in operation and had been for some time, yet he made no effort to warn appellees that they should not operate the station.

All of the evidence adduced was to the effect that the failure of appellees to have these informal operators' permits resulted from pure inadvertence in the belief that the expert from Motorola who sold them the equipment would fully acquaint appellees with all requirements for the lawful operation of the station. Indeed, but for the mischance of the lack of a couple of check marks on the applications (T.R. 47, Exhibits 1 and 2) the permits would have been issued on the only tape recorded conversations of appellees. In any event, under no construction of the evidence can a finding be made that the acts of appellees in operating the station without permits was done "willfully or knowingly" in violation of the law or any regulation.

REPLY ARGUMENT

Any argument seeking to persuade this Court to accept the search and seizure idea would be a waste of the time of court and counsel, since such acceptance would require the Court to overrule *Olmstead vs. U. S.*, 277 U.S. 438, 48 S.Ct. 564, 72 L. Ed. 944, and *Goldman vs. U. S.*, 316 U.S. 129, 62 S.Ct. 993, 86 L. Ed. 1322, and *On Lee vs. U. S.*, 343 U.S. 947, 72 S.Ct. 967, 96 L. Ed. 1270. Accordingly, we will, without waiving our belief that the dissenting opinions in the *Olmstead* case and following cases, represent the sound constitutional approach to the search and seizure question involved, perforce pass to the main questions involved.

Before proceeding to answer the main points made by the Government, a further brief fact statement is, we believe, in order.

The record affirmatively shows that the Federal Communications Commission, in coming to Arizona for the purpose of intercepting communications between appellees, did not come here as a part of any routine check up or other routine discharge of the duties imposed by law on that body. Rather, it was for the purpose of cooperating with the Department of Justice in an attempt to build a criminal case against appellees. (T.R. 34, 35). The station was then a regularly licensed station with an assigned frequency and there was no claim, or pretense of claim, that the station was not operating properly and a mere routine call at the station would have disclosed whether or not in fact the operators had then obtained their permits. In fact, this could have been ascertained through a check of the records of the Federal Communications Commission office in Los Angeles without even coming to Arizona. At the time when the agent of the Federal Communications Commission intercepted the communications between appellees on September 18th, the agent then knew that the station was fully licensed and that the operators thereof, appellees, likewise then held the necessary permit.

We have the situation, therefore, of officers of the United States charged with enforcing its laws acting in almost contemptuous disregard of the provisions of Section 605 of Title 47, U.S.C.A., commonly referred to as the Federal Communications Act. We will discuss this point further in connection with our argument based upon the case of *McNabb vs. U. S.*, 318 U.S. 332, 87 Law Ed. 819, 63 S.Ct. 608.

First, appellants attempt to distinguish the *two Nardone cases* (302 U.S. 379, 82 Law Ed. 314, 58 S.Ct. 275, and 308 U.S. 338, 84 Law Ed. 307, 60 S.Ct. 266) and the *Weiss case* (308 U.S. 321, 84 Law Ed. 298, 60 S.Ct. 269) on the basis that there is here involved radio conversations which were intercepted rather

than telephone conversations, apparently attempting to draw some distinction due to the difference in the media through which the electrical impulses were transmitted in this case and in the cases above referred to.

The language of Section 605 draws no such distinction. In fact, as the court noted in the *Weiss case*, the statutory prohibition against interception of messages and use thereof had existed from the beginning of regulation of radio, but was not extended to telephoned and telegraphed messages until the creation of the Federal Communications Commission and the consolidation of supervision over radio, telephone and telegraph in the Federal Communications Commission. A casual reading of Section 605 rather effectively disposes of this contention, since there is not the slightest intimation even of intent to differentiate between radioed and telephoned conversations in the statute.

In addition, inferentially, in *On Lee*, supra, the Supreme Court recognized that, had radio communications been there involved, Section 605 would apply.

The next position taken by the Government is to the effect that since federal agents made the interceptions as agents of the Federal Communications Commission, such interception was lawful. Appellants would read into the statute authorizing the Federal Communications Commission to make expenditures for the construction of monitoring stations and the fact that monitoring stations previously under the control of the Federal Radio Commission were turned over to the Federal Communications Commission when that body was established, authority to exercise nation-wide surveillance over all communications by radio. One might with equal logic argue that since the same statute authorizes the Commission to purchase law books, it thereby invests the Commission with authority to practice law and to hear and decide general litigation between private litigants. A careful reading of the entire act not only fails to disclose any

intent to grant such authority to the Federal Communications Commission, but in fact negatives any such intent. This same contention was made in the *First Nardone Case* that Section 605 should not be construed so as to hamper agents of the Government in the enforcement of the laws. The Supreme Court, however, gave full effect to the language of Section 605 which directs in clear language that "no person" shall divulge or publish the message (intercepted) or its substance to "any person" and said:

"It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same consideration may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendment of the Constitution."

Nardone vs. U. S., 302 U.S. 379, 58 S.Ct. 275, 82 Law Ed. 314.

It is equally plain that the language of Section 605 above referred to applies to agents of the Federal Communications Commission as well as to agents of all other governmental commissions. Effect cannot be given to the language of the *First Nardone Case* above quoted and leave any avenue open for the use of intercepted communications by any agent of the government. If the Congress had intended to permit activities of the nature disclosed by the record, it could, in very simple language, have created an exception to the all-inclusive and broad language of Section 605. Congress did, by proviso, clearly state as to what interceptions of messages Section 605 does not apply, adding the proviso to the end of said section thereby excluding from its application only radio communications broadcast or transmitted by amateurs or others for the use of the general public and signals radioed by ships in distress.

Clear it is from the foregoing that Congress had in mind in enacting Section 605 the broad sweep of its language and the question as to what, if any, messages should be exempted from the broad sweep of the prohibition contained therein. Having this in mind, the Congress did not see fit to extend authority to the Federal Communications Commission and its agents to intercept and divulge radioed communications, which communications might come to its attention in the routine checking of station frequencies and similar matters entrusted to the supervision of the Federal Communications Commission. The provision of Section 605 here involved applies to interception of any communication *and* divulging the same. Accordingly, even if it be assumed that the Federal Communications Commission in the normal discharge of its supervisory powers might be called upon to intercept messages, nonetheless Section 605 operates to forbid divulging the same to *any* person.

It is, of course, well established that generally speaking, a proviso in its normal usage, makes the general enacting clause of the statute to which it is attached applicable to everything subject thereto not exempted through the proviso.

George Moore Ice Cream Co. vs. Rose, 389 U.S. 373, 53 S. Ct. 522, 77 Law Ed. 1265

McDonald vs. U.S., 279 U.S. 12, 49 S. Ct. 218, 73 Law Ed. 582

White vs. U.S., 191 U.S. 545, 24 S. Ct. 171, 48 Law Ed. 295

That the Congress did not intend the Federal Communications Commission to exercise a general supervisory control over all communications made through radio is clearly shown through the express prohibition against any attempt at censorship by the Federal Communications Commission found in Section 326 of the act. As originally enacted in June of 1934, the statute contained a provision making unlawful the use of indecent language in radio communications. By the amendment in 1948 (Chap. 645,

Sec. 21, 62 Stat. 862) this prohibition against the use of indecent language was eliminated and made the subject of a separate statutory crime (Sec. 1464 Title 18 U.S.C.A.). Certainly, if it had been the intent of the Congress to permit the Federal Communications Commission to exercise a nation-wide supervision over the subject matter of radio communications, here would have been the place for an appropriate reference to that power.

Analyzing the applicable provisions of the act, particularly the portion thereof setting forth the powers and duties of the Commission, we find nothing which even remotely hints at an authorization to the Commission that its agents might intercept communications with impunity for the purpose of determining if the sender be engaged in some unlawful project. Section 303 of the act, which sets forth the powers of the Commission, demonstrates that the powers and duties of the Commission are primarily related to apportioning to applicants the bands and frequencies available, regulating the power involved and otherwise exercising an administrative control over radio communication. It is true that in *National Broadcasting Co. vs. United States*, quoted from by appellant in its brief at page 9, our Supreme Court indicated the Commission has powers beyond mere regulation of the engineering and technical aspects of regulation of radio communication. This case, however, involved a broadcasting facility rather than one for private communication and of course under the act as construed with reference to broadcasters, the Commission has much broader powers, since the public convenience is involved. The broadcasting there involved comes within the exception to Section 605 and it cannot be considered as even remotely authorizing what is here contended for by the government.

Even with respect to the power of the Commission to suspend the license of any operator, Section 303(m), we find nothing to indicate the Congress contemplated agents of the Commission would censor or monitor communications for the purpose of de-

termining if some crime might be in the making. The Congress specified six general causes for which a license might be suspended:

1. Violation of any Act, treaty or convention binding on the United States which the Commission is authorized to administer or any regulation made by the Commission under any such Act, treaty or convention;
2. Failure to carry out a lawful order of the master lawfully in charge of the ship or aircraft whereon the licensee is employed;
3. Wilfully damaging or permitting radio apparatus or installations to be damaged;
4. Transmitting superfluous radio communications or communications containing profane or obscene words or language, or knowingly transmitting false or deceptive signals or communications or a call signal or letter not assigned to the station being operated;
5. Wilful or malicious interference with any other radio communications or signals; and
6. Obtaining or attempting to obtain or assisting another in obtaining or attempting to obtain operator's license by fraud.

It is significant that subdivision 1 above does not extend the power of the Commission to revoke an operator's license for violation of any law but only for violation of any Act, treaty or convention binding upon the United States which the Commission is authorized to administer or for violation of any regulation made by the Commission under any *such* Act, treaty or convention. The use of the word "such" in connection with regulations made by the Commission clearly relates back to limit the word "Act" to such Acts as the Commission is authorized to administer.

Certainly had the Congress contemplated that the Federal Communications Commission was to serve as an arm of the Depart-

ment of Justice in enforcing our criminal statutes, here would have been the place to authorize it to suspend the license if the operator thereof was using the same in furtherance of some criminal scheme or conspiracy.

Section 303 further gives the Commission authority to *inspect radio installations* which are required to be licensed to ascertain "whether in construction, installation and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, of the conditions of the license or other instrument of authorization under which they are constructed, installed or operated." It is significant that the Congress limited the authority of the Commission to *inspect radio installations*, not to supervise, intercept and monitor all radio communications. Certainly, the intent of the statute contemplates a physical inspection of physical installations. Could a radio installation be "inspected" by intercepting its signals, not for the purpose of determining if it is on its assigned frequency and operating within its assigned power range, but for the purpose of ascertaining, in cooperation with the Department of Justice, if some criminal mischief is afoot? A complete analysis of Section 303 eliminates from consideration the possibility of any intent that Congress intended to grant to the Federal Communications Commission the broad power here contended for. In effect, the Federal Communications Commission would establish itself as a second Bureau of Investigation, and while such ready reaching for new fields of endeavor is not uncommon to federal agencies, before such assumption of power is accepted, particularly when it flies in the face of the plain language of a statute condemning the thing which the agency seeks to do, far more direct and clear language must be found in the statute authorizing it.

Turning now to Section 312, which deals with revocation of a station license or construction permit, we again find nothing indicating any thought on the part of the Congress that the Com-

mission was to supervise the contents of private communications by radio. Certainly, had the Congress contemplated that the Commission would be authorized to freely intercept radio communications some recognition thereof would be found through the grant of authority to revoke a station license if communications were emanating therefrom in furtherance of some unlawful purpose. The five causes for revocation listed are these:

1. False statements knowingly made in the application for a license or in any statement of fact in connection therewith;
2. Conditions coming to the attention of the Commission which would warrant it in refusing a license on an original application;
3. Wilfull and repeated failure to operate substantially as set forth in the license;
4. Wilfull or repeated violation of or failure to observe any provision of the Federal Communications Act or rule or regulation of the Commission lawfully authorized;
5. Failure to observe any cease and desist order issued by the Commission.

Without torturing the language of the section, no support can be gained therefrom to the idea that the Congress contemplated general supervision of the contents of all communications by radio by the Commission.

The Government then conjures up in support of its claim to exemption of the Federal Communications Commission from the prohibitions of Section 605 the bogey man of the foreign agent with the short wave radio. The argument is made that if the Federal Communications Commission should learn of this foreign agent broadcasting secret defense information of the United States to his foreign government, it should be permitted to disclose that information to the appropriate authorities. The answer to this

contention is that the problem presented by this argument is for the Congress and not for the courts. Equally well might this argument apply to all telephone conversations. The only lawful purpose of any monitoring by the Federal Communications Commission with respect to private radio communications as distinguished from broadcasting is to ascertain if the assigned frequency is being used and the assigned call letters are those employed and the power expended is within the range permitted. Beyond this there is nothing in the act with respect to private radio communication as distinguished from broadcasting conferring any authority upon the Commission and indeed, the prohibition against censorship clearly indicates the intent of Congress to preserve inviolate the right of individuals to communicate freely by means of radio without some governmental agency interfering. Accordingly, since the only legal reason for the monitoring station to listen in, in the sense of listening to the actual conversation, would be if it suspected a foreign agent of employing radio, with equal force we might argue then that if any law-enforcing agency suspected a foreign agent of employing the telephone or transcontinental cable in sending such messages, such law-enforcement agency should be permitted to tap the telephone wires.

The Government argues at some length then that since the Federal Communications Commission is authorized to inspect radio installations to ascertain if in construction, installation and operation they conform to the rules and regulations of the Commission and the provisions of the act, by implication there is conferred upon the Commission authority to divulge any information gained thereby.

First off, there is nothing in the act which even indicates the Congress intended to give the Commission any authority to supervise the contents of messages by radio communication other than broadcasting and accordingly, the government starts from the false premise of a power conferred which in fact is not conferred by the act and seeks to draw from such non-conferred power

the further authority, in the face of a flat statutory prohibition, to divulge information which the agency had no authority to gain in the first place. The argument of the Government on page 12 of its brief to the effect that the act should be construed as giving to the Commission power to monitor all radio communications for the protection of the national defense and welfare might well be addressed to the Congress, but to date the Congress has failed to be impressed by that argument and has plainly denied to the Commission the power to intrude itself into the affairs of citizens contrary to the historic American concept of personal liberty.

Finally, the Government turns to the argument that since during a part of the time the witness Stratton was eavesdropping on the conversations between appellees, they had not yet received their operators permits, they were therefore outside the protection of Section 605. It is not disputed that on his first interception the witness Stratton did not have a wire or tape recorder available and only took notes manually, but on the interception September 10th and September 18th, a wire or tape recorder was used (T.R. 37). These tape recordings played a large part in the matter of inducing the claimed co-conspirators to give statements (T.R. 50, 51, 53, 54, 59); were used by the United States Attorney in trial preparation and he proposed to use the witness Stratton for the purpose of testifying to the contents of these intercepted messages without reference to whether intercepted September 18th or prior thereto. Plainly the use of the transcriptions taken on September 18th when no question existed as to full qualification of the station and appellees as operators was so intermingled with the previous interceptions in use both in securing witnesses and evidence, in securing the indictment and for trial preparation that the entire proceeding was tainted from the outset with the "tainted" fruit of the interception which was plainly unlawful.

We believe we might rest here under the rule laid down in the *Second Nardone Case* to the effect that an unlawful interception and its use being shown by the defendant, the Government

then must convince the trial court that it has an independent source of evidence necessary to convict. (See also *U.S. vs. Coplon*, 185 F2d 629 C.C.A.2, Cert. denied, 72 S.Ct. 362, 342 U.S. 920, 96 L. Ed. 690.)

But we cannot agree with the Government's contention that the mere lack of a purely formal permit, occasioned through lack of experience and through reliance upon the guidance of one whose experience and position warranted such reliance, can operate to overturn the protection intended by the Congress in enacting Section 605—can defeat a public policy bottomed upon considerations of ethics and morality.

"We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in *Nardone v. United States*, supra. That decision was not the product of a merely meticulous reading of technical language. *It was the translation into practicality of broad considerations of morality and public well-being.* This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 302 US 379, 384, 82 L ed 314, 317, 58 S Ct 275. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' * * *" (emphasis supplied)

Nardone vs. United States, 308 U.S. 338, 60 S.Ct. 266, 84 Law Ed. 307

Counsel for the Government rely upon *Casey vs. United States*, 191 F. 2d 1 as sustaining the Government's position. The facts are in nowise similar and, in addition, the Government confessed error on appeal to the United States Supreme Court and the case was re-

versed. True, the error confessed related to an unlawful search and seizure and the admission into evidence of property obtained thereby. The decision, insofar as here in point, was reached without any consideration or discussion of the pertinent Supreme Court decisions and amounted to a mere assertion by the District Judge authoring the opinion that Section 605 did not apply, all without citation of authority or statement of the reasoning supporting the conclusion.

However, the case is easily distinguishable on the facts. The prosecution was for operating an unlicensed station without a permit. It is clear from the opinion that the proof was abundant such operation was wilfull and intentional.

"The appellants were unlicensed operators transmitting voice messages over an unlicensed station, without call letters, on a portion of the band reserved for Morse Code operations." *Casey vs. U. S.*, supra.

Here the station was licensed, there is no claim of any improper physical operation of the station and the failure to obtain the formal permit required was not wilful or intentional. Certainly there is nothing *malum in se* in the failure of appellees to check the proper places on the application and send it in for issuance administratively of a simple permit. No public safety is involved—no loss of public funds derived from the licensing of applicant adds to the seriousness of the omission. It was a pure oversight innocently occasioned to complete a mere formal application and yet the government would attach to it the gravest consequences and contend that thereby appellees lost the protection of Section 605, a statute enacted to establish a rule of evidence based upon public policy and considerations of ethics and morality.

If Section 501 (general penalty provisions) applies to the use of the station by appellees prior to securing their operators' license, which is doubtful, it could only become applicable upon

a showing that the appellees so operated their station "wilfully and knowingly" and the record is overwhelmingly against such a conclusion. If appellees cannot be found to have violated the penal provisions of the Act, then certainly the position of the Government, in effect making them outlaws, fair game for any over-zealous law enforcement officer, is not sound.

CONCLUSION

Despite the exact and clear words of the Supreme Court of our land in the *First Nardone Case* denying the claim that federal agents are exempt from the prohibitions of Section 605 and its equally clear language in the *Second Nardone Case* that methods here employed are "inconsistent with ethical standards and destructive of personal liberty" we find the Department of Justice soliciting the unlawful conduct here involved and agents of the Federal Communications Commission boldly seizing the power denied them by the Congress and our courts, apparently upon the theory they are above the law. They would employ the subterfuge of checking to ascertain if the station was operating in accordance with its licensed purpose to gain the forbidden end of intercepting and divulging communications in aid of the Department of Justice in building a criminal case.

We respectfully submit the learned Trial Judge took the only action a federal judge could take when this unlawful purpose and course of conduct was disclosed as the entire foundation of the Government's case, permeating it through investigation, indictment and trial preparation and proposed for use on the actual trial of the cases. *McNabb vs. U.S.* (supra).

Respectfully submitted,

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For the Ninth Circuit

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APPELLANT'S REPLY BRIEF

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PAUL P. O'BRIEN
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IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA
Appellant

vs.

ROBERT V. H. SUGDEN AND
JEAN S. SUGDEN
Appellees

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court,
District of Arizona

ARGUMENT

The Government does not intend to burden the Court with a lengthy reply brief, but in the excellent brief of Appellees their counsel have raised certain points and issues which the Government feels must be answered.

First, the Government must take issue with the learned counsel for defendants (appellees) when they state in Appellees' Brief, at page 15, that there is no claim of any improper physical operation of defendants' radio station. The record shows that witness Stratton was sent by Washington to investigate a suspected illegal use of radio (T.R. 34); he was to listen

to radio transmissions to see if the radio station of defendants was being used for an authorized purpose (T.R. 35) Mr. Stratton did monitor the defendants' radio station, and he confirmed the fact that the radio station was being operated for an illegal purpose (T.R. 39). A Federal Grand Jury heard Mr. Stratton's testimony and that of other witnesses (TR. 40, 41, 54 and 59), and as a result of that testimony the Grand Jury returned indictments against defendants one of which (C-11,554-Phx), is on appeal here, and it specifically charges defendants with conspiring to conceal illegal immigrants and accomplishing this object by use of radio broadcasting.

It is the contention of the Government that there is ample evidence of the defendants' illegal operation of their radio station, and this illegality brings this case under the reasoning and decision of this Court in *Casey vs. United States*, C.C.A.9, 191 F. 2d. 1. This position is buttressed by the fact that defendants were unlicensed operators throughout three of the four monitorings which establishes these cases as strikingly similar in fact situation to the *Casey* case.

Counsel for the defendants seek to pass off the unlicensed operation by defendants as inconsequential and as innocent misguidance. The Government does not propose to argue the contention as to defendants' claim of misplaced confidence—these are matters for a trial jury. The issue in this appeal is the effect of defendants unlicensed operation. Counsel for defendants argue that the lack of a license is a formal and technical point which should not act against the defendants' claim of protection under Section 605 of Title 47. It must be remembered that Section 318 of Title 47 requires that radio operators be licensed. The language of this section is plain and unambiguous, and the intent behind this

provision is made even clearer when the purpose of the Act, as stated in Section 301 of Title 47, is announced to be, among other things, the maintenance of control by the United States over all the channels of interstate and foreign radio transmission. The intent of Congress seems clear.

The evidence indicates that the defendants have broadcast without radio operators' licenses, have broadcast to effectuate an illegal purpose, yet defendants ask this Court to cloak them with the protection of Section 605. The Government contends that the defendants have no standing to claim the rights of the statute until they have performed the duties.

Secondly, the Government opposes the construction which counsel for defendants has placed on the Communications Act concerning the power of the Federal Communications Commission to monitor radio broadcasts. Counsel for defendants argues that the Communications Act evidences no intent that the Commission is authorized to intercept radio communications for the purpose of determining if the sender is engaged in an unlawful project; further, that the Commission is limited to matters of technical administrative control of radio communications; lastly, that the first *Nardone* case (*Nardone v. U.S.*, 302 U.S. 379) has settled the question of whether the Commission can monitor and disclose its information.

The issue of whether the Commission can monitor has never been decided by any appellate court, to the knowledge of Government counsel. The Supreme Court in *Nardone* and the several wire tapping cases was not presented with the specific issues presented in this appeal, and hence those cases are not controlling. In the wire tapping cases the issue was whether Section 605 applied to federal officers tapping telephone lines. In

the present case the issue concerns the Commission's power to monitor radio signals. The crux of the case rests upon an interpretation of the powers of the Commission under the Communications Act.

In *National Broadcasting Co. v. United States*, 319 U.S. 190, the Supreme Court took the view that the Commission had the power to determine the composition of radio transmission, and the Government believes that this applies to small broadcasters as well as national broadcasters. A careful study of the Act must necessarily bring one to this conclusion.

Opposing counsel argue that the limited grounds for revocation of station and operators licenses show that the Commission has no power to determine by monitoring whether a station is operating an unlawful project. It must be pointed out that violation of the Commission's regulations and wilfull operation contrary to the license are grounds for revocation. In order for the Commission to determine whether the operators are adhering to regulations and whether they are broadcasting within the sphere of the license requires that the Commission listen to the contents of the broadcasts. There is no limitation stated that these matters are limited to deciding whether the station has correct call letters and so on, but the matter goes beyond this, for the Commission is directed to ascertain whether the station is operated in compliance with its license. The operation of a radio for an illegal purpose is certainly not a purpose authorized by a license issued by the Commission.

Nor does the fact that the Commission may not censor broadcasts in any way indicate an intent by Congress that the Commission should not monitor broadcasts. Freedom of speech is preserved in radio broadcasting, but an abuse of this freedom can be the subject

of a criminal investigation the same as criminal libel, perjury, soliciting the overthrow of the government, disturbing the peace, etc. Liberty is maintained in radio broadcasting but blank license to violate the law is not contemplated.

But of major importance in this case is Section 303 (n) of the Act, Counsel would pass this section off as a false premise; nevertheless this section gives the Commission power to determine whether a station licensed under the Act is operating in conformance with the provisions of any Act. The Government believes that this broad provision was consciously and deliberately placed in the Act by Congress in order that the Commission might exercise control over improper and illegal radio broadcasting. Counsel for defendants read this provision, however, as limiting the Commission's power to acts it is authorized to enforce. But this position gives them no comfort, for the defendants were operating under the Communications Act, one which the Commission is certainly authorized to administer, with a station license authorizing radio broadcasting for farming purpose, and the defendants operated contrary to this license by using the radio to facilitate the hiding of illegal immigrants. The Commission assuredly had the authority and duty to investigate this matter to determine that the defendants were illegally using radio broadcasting. It is the contention of the Government that the only possible and practicable method of determining such an illegal use of radio is by monitoring, and Congress must have intended that the Commission make use of monitoring in order to inspect a radio station in operation. Support to this position is found in the fact that Congress has continued each year to appropriate money for the Commission's monitoring activities since 1927.

Taking a view of the Communications Act as a whole and the continuance of Congressional appropriations for monitoring, the Government is compelled to argue that Congress intends that the Commission continue to monitor radio broadcasts; and it is further contended that Congress intended the Commission should make use of the contents of radio broadcasts in enforcing the Communications Act or divulging such information to other agencies when such broadcasts violate the provisions of any Act.

CONCLUSION

The defendants have disregarded the duties placed upon them by the Communications Act, but they now demand the rights and protection of that same Act. The Government respectfully urges that the defendants be denied such standing under the Act.

Finally, the Government urges that its construction of the powers given to the Communications Commission be adopted as presenting the intent of Congress on the subject.

The Government realizes that personal liberties are to be held most dear and guarded zealously by the courts, but of equal importance is the obligation of the Government and courts to protect its citizens from crime and criminals. Law violators have not been slow to make use of all the advantages of science, and it is a continual struggle that law enforcement officers wage to protect the citizenry from the new schemes and methods of the lawless. The medium of radio is in this instance the subject of use for illegal ends, but by monitoring defendants' radio broadcasts such illegal use was frustrated. The Government contends that the methods and procedures followed in these cases were authorized by statute and did not violate the rights of the defendants under the law.

The Government respectfully urges the judgment of trial Court be reversed.

Respectfully submitted,

JACK D. H. HAYS
United States Attorney

WILLIAM A. HOLOHAN,
Assistant U. S. Attorney
Attorneys for Appellant

No. 14405

IN THE

United States
Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN,

Appellees

APPELLEES' PETITION FOR REHEARING

SNELL & WILMER

Bryant W. Jones

Attorneys for Appellees

FILED

OCT 26 1955

PAUL P. O'BRIEN, CLERK

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No. 14405

IN THE

United States
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For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN,

Appellees

APPELLEES' PETITION FOR REHEARING

Come now Robert V. H. Sugden and Jean S. Sugden, appellees herein, and present this, their petition for rehearing in the above entitled cause, and in support thereof, respectfully show:

I

Appellees, pursuant to the rule as laid down by the Supreme Court in the *Goldstein case* as interpreted by the Second Circuit in the *Coplon case*, clearly established that substantial evidence condemned as illicitly obtained by the test as to illegality established by the Court in its opinion rendered herein was employed by the Government before the Grand Jury in securing the indictments quashed by the District Judge and in preparing its case against appellees; and further, that it would use such evidence on the trial of the cause. These facts appearing to the satisfaction of the

District Judge the burden fell upon the Government to satisfy the District Judge:

(a) That the indictments were untainted by the use of such unlawful evidence;

(b) That such evidence, so unlawfully obtained, did not play any substantial part in building the Government's case, directly or indirectly;

(c) That the evidence which the Government proposed to offer on the trial of the cause sprang from independent sources untainted by and not traceable to such unlawful interception and divulgence.

U. S. vs. Goldstein, 62 S. Ct. 1000, 316 U.S. 114, 86 L. ed. 1312

U. S. vs. Coplon, 185 F. 2d 629, *Certiorari denied* 72 S. Ct. 362, 342 U.S. 920, 96 L. ed. 690

Accepting for the purpose of this argument the distinction drawn by this Honorable Court between communications sent by an unlicensed operator and a licensed operator, it is clear that there were two recordings made by Stratton, one when the operator's permit was in effect, one when such permits were only applied for. *The Government knew which of these transcriptions it had employed in building its case and in obtaining these indictments. It knew which of these it proposed to use on the trial of the action. These appellees were not so advised.*

The rule which the Court here declares as to the effect of the lack of a proper license had been theretofore declared by the Ninth Circuit in *Casey vs. U. S.*, 191 F. 2d 1, and was known to the Government.

Yet the Government made no effort or offer to show that the indictments were untainted by this unlawful evidence or that it

could proceed with lawful evidence arising from a lawful source.

Indeed, Stratton testified that he did in fact relate the entire interception procedure to the Grand Jury:

"A. Well my testimony was a running account of what had happened from the time we were first called in on the case." (T.R. 40)

* * * * *

"Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

"A. That is correct, the general use of the radio in that particular case." (T.R. 41)

How can the District Judge remove this taint from the indictment; how can he ascertain what effect the unlawful testimony had upon the minds of the Grand Jurors?

The ruling is in conflict with both *Goldstein*, supra, and *Coplon*, supra.

II

Our inadequate presentation of the proposition that the Federal Judiciary will not countenance any "dirty business" in or about the administration of federal justice we believe caused the Court to overlook this sound reason for the action of the District Judge.

May we very briefly point to these facts:

(a) Stratton's purpose in coming to Arizona was to "wire tap" radio communications of appellees at the behest of the Department of Justice on complaint of the Immigration Serv-

ice, the substance at least of which "tapped" conversations was promptly disclosed to the Immigration Service followed by a full divulgence of the two recorded "tappings"; (T.R. 39, 38)

"Q. When was the first time that these conversations, if I may call it as such, were delivered to the Immigration Service?

"A. There was probably a copy under confidential cover of each one within a day or two after the transcript was made.

"Q. During the course of your visit here, your various visits here, Mr. Stratton, did you work with the Immigration Service in the sense of—I mean, you were in contact with the Immigration Service there at Yuma?

"A. Well, in the sense that I stopped by the office on my way to Yuma. We don't have any radio contact. We weren't on the same frequency.

"Q. You did see them during the time you were there at various times?

"A. Yes, I was ordered to on my first trip, because, obviously, the complaint was on the basis of their complaint.

(b) The purpose of the "wire tapping" was not to ascertain if an unlicensed station was operating or if unlicensed operators were transmitting or if an unassigned frequency was being employed; the purpose was to, in cooperation with the Department of Justice and in direct defiance of said Section 605, intercept and divulge communications *without reference to or regard for* whether the station or the operators were licensed or unlicensed. Indeed, in the course of the "wire tapping" procedures operators' licenses were issued to appellees, so plainly the Federal Communications Commission and its officials were not concerned with this phase of appellees' activities.

(c) Since licenses are not required for the operation of the mobile end of the communications equipment, at least one party to the intercepted conversations was not in the category of an unlicensed operator at all times.

Weighing then in the balance of propriety the simple oversight of the appellees to obtain a "perfunctory permit" against the purposeful, deliberate flouting of a statute of the United States (a criminal offense, if you please) and the denunciations of our Supreme Court of "dirty business" in law enforcement, can it be said a Federal Court should countenance such conduct by, in effect, condoning it?

This is not evidence stumbled upon in the course of a lawful discharge of duties imposed by law upon the Federal Communications Commission; *this is evidence purposefully sought out in direct defiance of law*. Would it be said that because one operating an unlicensed motor vehicle upon the highway without an operator's license thereby becomes subject to unlawful search and seizure because he is unlawfully upon the highway and has no right to be driving the vehicle? Would the Government contend the police authorities might arbitrarily stop all motorists and search their vehicles with the legality of such action turning upon the chance of the presence or absence of a driver's license in each instance?

"... Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

* * * * *

"For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence.

It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong."

Nardone vs. U. S., 82 L. ed. 314, 317, 318, 302 U.S. 379

The fact that appellees may not have had "perfunctory" operators' licenses for a portion of the time when the "wire tapping" was going on does not change the fact that the indictments returned herein and the Government's case rest upon evidence gained "through resort to methods deemed inconsistent with ethical standards and destructive of personal liberty"—through a practice "... which involves a grave wrong."

Does the "perfunctory" odor of a technical oversight blot out, override and dissipate the stench of a purposeful flouting of the declared public policy of our land, declared not only by our Congress but reaffirmed by our Supreme Court?

We respectfully urge this Honorable Court has overlooked the basic underlying principle which condemns a practice such as here indulged in by the Government; has overlooked the fact that a mere technical omission of these appellees cannot make something morally right which in its very essence is morally wrong; cannot make something lawful which in its very nature is abhorrent to law and decency.

III

Finally, we must take issue with the Court's conclusion that some "spying" on the part of the Federal Communications Commission, having for its purpose the detection of law violation, is implicit in the Communications Act. Nowhere can we find any authority in the Commission spelled out directly or indirectly in

the Commission to police for profanity. Indeed, the prohibition against use of indecent language has been lifted out of the Act and transferred to Title 18, Chapter 71. Nowhere is there any indication that obscenity by radio communication is to be policed in any fashion different than obscenity by mailing obscene matter condemned by Section 1461, Chapter 71, Title 18 U.S.C.A.

Does the Post Office Department have the right to "sample" private mailings to see if perchance some obscene matter is to be found therein? By the same line of reasoning as the Court applies to radio communication we reach the unhappy conclusion that our postmaster or letter carrier has carte blanche to open and read our most private correspondence on a "night ride" for obscenity in the mails. True it is that Section 303 (D) authorizes the Commission to revoke the operator's license of one transmitting obscene words but so does Section 259a, Chapter 6, Title 39 U.S.C.A. (1954 Cum. Pocket Part) authorize the Postmaster to exclude from the mails obscene solicitation matter and Section 1461, Title 18 declares nonmailable obscene matter "shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

A careful reading of the Act, particularly Section 303 thereof "Powers and Duties of the Commission" read in the light of Section 326 denying the power of censorship to the Commission and preserving the right of free speech, discloses a careful intent upon the part of our Congress to deny the Commission such authority. If it was intended the Commission should spy for law infractions why did not the Congress authorize the Commission to revoke the operator's license of a person found by it to be engaged in such nefarious activity—it authorized such action in particular instances and for particular infractions—Section 303, (A) through (F)—but clearly negatives the thought it was creating a super police state within our land insofar as radio communication is concerned with a lawful ear in the "key hole" of every operator of a radio transmitter, so long as the ear be placed there under the guise of

listening for profanity or obscene matter. Certainly if the Commission can lawfully wire tap to detect obscenity or to ascertain that the station is upon its assigned frequency, it can disclose what is thereby lawfully learned. The language of Section 605 discloses no such intent upon the part of the Congress, for the few instances in which disclosure is permitted are carefully spelled out.

While the Court holds that spying by the Federal Communication Commission is unlawful if the operator of the transmitting equipment is licensed, it also holds in effect that spying at the behest of the Department of Justice for the purpose of gathering evidence in a criminal case is lawful if by chance the operator of the transmitter is unlicensed even though the Federal Communications Commission did not know the operator was unlicensed and the alleged criminal matter under investigation was unrelated to the functions of the Federal Communications Commission.

We respectfully urge that the technical and innocent oversight of appellees in failing to properly fill out a form for a "perfunctory" license does not make them "outlaws of the ether highways", shorn of all the rights of a citizen of the United States, to be shot on sight by the Federal Communications Commission stalking them, not as unlicensed operators of communications equipment and for that delinquency, but in cooperation with the Department of Justice and the Immigration Service for the claimed offense of concealing aliens—a matter generally accepted as somewhat beyond the jurisdiction of the Federal Communications Commission.

CONCLUSION

We seriously and urgently represent to the Court that a rehearing should be ordered.

Respectfully submitted,

SNELL & WILMER

Mark Wilmer

Bryant W. Jones

Attorneys for Appellees

CERTIFICATE OF COUNSEL

I, Mark Wilmer, counsel for the above named Robert V. H. Sugden and Jean S. Sugden, appellees, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Mark Wilmer

Counsel for Robert V. H. Sugden and
Jean S. Sugden, *Appellees*



No. 14406

**United States
Court of Appeals**
for the Ninth Circuit

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Appellant,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,
Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Idaho,
Eastern Division.**

FILED

OCT 1 1954

PAUL D. O'BRIEN
CLERK



No. 14406

**United States
Court of Appeals**
for the Ninth Circuit

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Appellant,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,
Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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201 Rogers Building,

Idaho Falls, Idaho,

Attorney for Appellee.



In the United States District Court for the
District of Idaho, Eastern Division

Civil Action—File No. 1810

LLOYD A. MASHBURN, Acting Secretary of
Labor, United States Department of Labor,

Plaintiff,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,

Defendant.

COMPLAINT

I.

Plaintiff, Lloyd A. Mashburn, Acting Secretary of Labor, United States Department of Labor, brings this action to recover from defendant, Idaho Lumber Company, Inc., a corporation, unpaid overtime compensation due its employees LaVern F. (Bud) Westfall, Sylvester Kramp, Clifford C. Pierce, and Robert Horn, under the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by 63 Stat. 910; U.S.C. Ti. 29, Sec. 201, et seq.), hereinafter referred to as the Act.

II.

Defendant Idaho Lumber Company, Inc., is, and at all times hereinafter mentioned was, a corporation licensed to do business under the laws of the State of Idaho and engaged in doing business in

said State and having a place of business, sawmill and planing mill at Salmon, Lemhi County, Idaho, where it is engaged in the production, sale and distribution of green and finished lumber for interstate commerce.

III.

(a) Jurisdiction of this action is conferred upon the court by Section 16 (c) of the Act, and by U.S.C. Ti. 28, Sec. 1337.

(b) Under the provisions of Reorganization Plan No. 6, dated March 13, 1950, effective March 24, 1950, issued under the Reorganization Act of 1949, U.S.C. Ti. 5, Sec. 133 (z), et seq., the functions of the Administrator of the Wage and Hour Division, United States Department of Labor, under the Fair Labor Standards Act have been transferred to the Secretary of Labor.

IV.

For his first cause of action herein Plaintiff alleges:

(a) LaVern F. (Bud) Westfall has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed LaVern F. (Bud) Westfall, from September 16, 1951, to December 5, 1952, in the production of lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in

interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above LaVern F. (Bud) Westfall was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said LaVern F. (Bud) Westfall in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$683.49, which amount has been demanded of defendant and remains unpaid.

V.

For his second cause of action herein Plaintiff alleges:

(a) Sylvester Kramp has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed Sylvester Kramp from September 16, 1951, to December 5, 1952, in the production of

lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above Sylvester Kramp was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said Sylvester Kramp in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$246.21, which amount has been demanded of defendant and remains unpaid.

VI.

For his third cause of action herein Plaintiff alleges:

(a) Clifford C. Pierce has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed Clifford C. Pierce from November 13, 1951, to December 5, 1952, in the production of lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above Clifford C. Pierce was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said Clifford C. Pierce in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$146.28, which amount has been demanded of defendant and remains unpaid.

VII.

For his fourth cause of action herein Plaintiff alleges:

(a) Robert Horn has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed Robert Horn from January 4, 1952, to December 5, 1952, in the production of lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above Robert Horn was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said Robert Horn in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$236.20, which amount has been demanded of defendant and remains unpaid.

Wherefore, plaintiff demands judgment against the defendant in the total amount of \$1312.18, together with interest thereon and costs.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ CLYDE D. BIRD, JR.,
Associate Attorney, United States Department of
Labor, Attorneys for Plaintiff.

[Endorsed]: Filed September 17, 1953.

[Title of District Court and Cause.]

SUMMONS

To the Above-Named Defendant, Idaho Lumber
Company, Inc.:

You are hereby summoned and required to serve upon Kenneth C. Robertson, Regional Attorney, United States Department of Labor, plaintiff's attorney, whose address is Room 144, Federal Office Building, Fulton and Leavenworth Streets, San Francisco 2, California, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so,

judgment by default will be taken against you for the relief demanded in the complaint.

Date: Sept. 17, 1953.

[Seal] ED. M. BRYAN,
Clerk of Court.

By /s/ LONA MANSEC,
Deputy Clerk.

Return on Service of Writ attached.

[Endorsed]: Filed September 29, 1953.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint of the plaintiff herein, defendant admits, denies and alleges, as follows:

I.

Denies each and every allegation, matter and thing in said complaint contained, save and except as hereinafter specifically admitted, qualified, or explained.

II.

Admits the allegations of said complaint as to the jurisdiction of this court and the plaintiff's capacity to sue.

III.

Admits that at the times mentioned in said complaint, defendant was and is a corporation, organ-

ized under the laws of the State of Idaho, doing business therein, and operating a sawmill and planing mill at Salmon, Idaho, engaged in the production, sale and distribution of lumber, but alleges that at all times mentioned in said complaint, the defendant was engaged in such production, sale and distribution and lumber exclusively and entirely for intrastate commerce.

IV.

Admits that LaVern F. (Bud) Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn were employed by defendant during the periods mentioned in said complaint, and admits that defendant did not pay such employees at a rate of one and one-half times the regular rate at which they were employed, but alleges that said employees were each and all engaged in the production for lumber for intrastate commerce only, and that none of said employees were engaged in the production of lumber for interstate commerce at any time during their said periods of employment.

Wherefore, defendant prays that this action be dismissed, and that defendant have such other relief as may be proper.

ALBAUGH, BLOEM,
BARNARD & SMITH,

By /s/ GEO. L. BARNARD,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION
OF PLAINTIFF

It is hereby stipulated by and between plaintiff and defendant that on October 9, 1953, Lloyd A. Mashburn resigned as Acting Secretary of Labor, and was succeeded in the office of Secretary of Labor on October 9, 1953, by James P. Mitchell, his duly qualified successor, and that said James P. Mitchell has assumed all the functions of the Secretary of Labor, United States Department of Labor, under the Fair Labor Standards Act of 1938, as amended. It is agreed that an order may be entered herein substituting James P. Mitchell in place and stead of Lloyd A. Mashburn as plaintiff in this action, without prejudice to the proceedings already had herein, and this cause may be continued and maintained by said James P. Mitchell as successor to said Lloyd A. Mashburn.

Dated November 10, 1953.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ CLYDE D. BIRD, JR.,
Associate Attorney, Attorneys for Plaintiff, United
States Department of Labor.

/s/ GEO. L. BARNARD,
Attorney for Defendant.

ORDER

It is ordered that James P. Mitchell, Secretary of Labor, United States Department of Labor, be, and he is hereby substituted as plaintiff herein in place of Lloyd A. Mashburn, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said James P. Mitchell as successor to Lloyd A. Mashburn.

Dated Nov. 20th, 1953.

/s/ CHASE A. CLARK,
Judge of the United States
District Court.

[Endorsed]: Filed November 20, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY—NOVEMBER 20, 1953

Counsel for respective parties having stipulated and requested the Court for an order directing the Clerk to show this cause of action filed in the Eastern Division, and the Court being advised, ordered the case transferred to the Eastern Division for all further proceedings.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between plaintiff and defendant:

1. That the title of the Court in the caption of the Complaint be amended by striking the word "Southern" and substituting therefor the word "Eastern."

2. That the title of the Court in the caption of the Answer be amended by striking the word "Southern" and substituting therefor the word "Eastern."

3. The Clerk of the Court is requested to correct his records so as to show this case to be in the United States District Court for the District of Idaho, Eastern Division.

Dated November 10, 1953.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ CLYDE D. BIRD, JR.,
Associate Attorney, Attorneys for Plaintiff, United
States Department of Labor.

/s/ GEO. L. BARNARD,
Attorney for Defendant.

ORDER

It is so ordered.

Date: Nov. 20, 1953.

/s/ CHASE A. CLARK,

Judge of the United States
District Court.

[Endorsed]: Filed November 20, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY—DECEMBER 10, 1953

This cause came on for trial before the Court sitting without a jury; the plaintiff being represented by Clyde D. Bird, Jr., and defendant represented by George L. Barnard.

Certain facts were stipulated into the record and, upon motion of counsel, it was ordered that the complaint be amended by interlineation.

Elbert Shaw and Arthur B. Johnson were sworn and examined as witnesses, and other evidence was introduced, on the part of the plaintiff, and here the plaintiff rests.

Arthur B. Johnson and Rula Johnson were sworn and examined as witnesses on the part of the defendant, and here the defendant rests and both sides close.

It was agreed that argument be submitted on brief, plaintiff to have 30 days to file opening brief,

defendant 30 days to answer, and plaintiff 15 days to reply.

It was ordered that the Clerk release the exhibits to the attorneys for preparation of briefs.

[Title of District Court and Cause.]

MEMORANDUM

Clark, District Judge.

This matter came on for trial before the Court, sitting without a jury, at Pocatello, Idaho, on the 10th day of December, 1953. Witnesses were sworn and examined and evidence was introduced on behalf of the parties. At the conclusion of the trial the matter was taken under advisement by the Court. Thereafter, briefs were filed by respective counsel and the same have been fully considered by the Court.

After a full consideration of the evidence and the law, this Court is of the opinion that the defendant was not engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938, Title 29 U.S.C. Sec. 201 et seq.

Counsel for the defendant may prepare Findings of Fact and Conclusions of Law and Judgment in accordance with the Court's opinion herein, submitting the original thereof to the Court for its approval and serving a copy on counsel for Plaintiff.

Dated this 9th day of March, 1954.

[Endorsed]: Filed March 9, 1954.

In the United States District Court for the
District of Idaho, Eastern Division
File No. 1810

JAMES P. MITCHELL, SECRETARY OF
LABOR, UNITED STATES OF DEPART-
MENT OF LABOR,

Plaintiff,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled cause came on for trial before the undersigned Judge of said Court, without a jury, the 10th day of December, 1953, at Pocatello, in said District of Idaho, on the complaint of the plaintiff to recover alleged overtime wages for the benefit of LaVern F. Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn, former employees of the defendant, under the provisions of the Fair Labor Standards Act of 1938, (Act of June 25, 1938, c.676, 52 Stat. 1060, as amended by 63 Stat. 910; U.S.C. Ti. 29, Sec. 201, et seq.), Clyde D. Bird, Jr., appearing as counsel for the plaintiff, and Geo. L. Barnard, of the firm of Albaugh, Bloem, Barnard & Smith, appearing as counsel for the defendant.

Evidence was introduced by the parties in support of the pleadings, briefs were presented by counsel, and the cause submitted to the Court.

Now, after considering the evidence, the files and records of said action, and the briefs of counsel, the Court finds as follows:

I.

That the plaintiff, James P. Mitchell, is the Secretary of Labor, United States Department of Labor, and is authorized to bring actions of this nature under the provisions of said Fair Labor Standards Act, and that this Court has jurisdiction of such action by virtue of the provisions of said Act.

II.

That defendant, Idaho Lumber Company, Inc., is, and at all times referred to in said complaint was, a corporation organized and existing under and by virtue of the laws of the State of Idaho, engaged in business in said State, in operating a sawmill and planing mill at Salmon, Idaho, in the production, sale and distribution of green and finished lumber.

III.

That said LaVern F. Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn were employed by the defendant in its said sawmill and planing mill during the times mentioned in said complaint, and that each of them has filed with plaintiff a written request to bring this action, pursuant to the provisions of Section 16(c) of the Fair Labor Standards Act.

IV.

That at all times mentioned in said complaint, defendants production, sale and distribution of lumber and the products made by defendant therefrom

was in and for intrastate commerce within the State of Idaho; that none of said lumber or products was produced in or for interstate commerce within the meaning of the Fair Labor Standards Act; that the only transaction entered into by defendant wherein any of said lumber or productions went outside the State of Idaho during the times mentioned in said complaint was the making of warehouse equipment consisting of a quantity of bean boxes and pallets to Rogers Brothers Seed Company, an Idaho corporation, for use in its seed processing plants, some of which are located outside the State of Idaho, which bean boxes and pallets were made by defendant for said Rogers Brothers Seed Company under a single contract, constituting an isolated transaction outside of the ordinary and usual course of defendant's business and operations, and, as such, did not constitute production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

V.

That none of the defendant's employees for whose benefit this action is brought were engaged in the production of goods for interstate commerce during any of the times mentioned in said complaint.

Conclusions of Law

As Conclusions of Law, the Court finds that defendant is entitled to the decree of this Court that the Court has no jurisdiction to grant any relief to plaintiff in this action under the Fair Labor Standards Act, and that this action be dismissed, on the merits.

Judgment

From the foregoing, it is therefore Ordered, Adjudged and Decreed that this Court has no jurisdiction to grant any relief to plaintiff in this action and that the same be, and hereby is, in all things dismissed, on the merits.

Dated this 30th day of March, 1954.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed March 30, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that James P. Mitchell, Secretary of Labor, United States Department of Labor, plaintiff herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the whole of the final judgment entered in this proceeding on March 30, 1954.

Dated: May .., 1954.

/s/ STUART ROTHMAN,

Solicitor;

/s/ BESSIE MARGOLIN,

Chief of Appellate Litigation;

/s/ KENNETH C. ROBERTSON,

Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

[Endorsed]: Filed May 19, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to August 17, 1954.

Dated this 25th day of June, 1954.

/s/ CHASE A. CLARK,

District Judge.

[Endorsed]: Filed June 28, 1954.

In the United States District Court for the
District of Idaho, Eastern Division
No. 1810

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

STUART ROTHMAN, ESQ.,
KENNETH C. ROBERTSON, ESQ.,
CLYDE D. BIRD, JR., ESQ.,
Attorneys for Plaintiff.

ALBAUGH BLOEM, BARNARD & SMITH,
GEORGE L. BARNARD, ESQ.,

Attorneys for Defendant.

December 10, 1954

Mr. Bird: In this case, if the Court please, I think we are able to stipulate on some of the facts.

The Court: Perhaps you would like some time to get together on the stipulation.

Mr. Bird: On this case, Mr. Barnard, you will admit that the employees named in the complaint worked for the defendant at its Salmon sawmill producing lumber and that their hours of work and their pay is shown correctly on the Defendant's records.

Mr. Barnard: It may be so stipulated.

Mr. Bird: And you will agree that they asked the Government to collect their overtime.

Mr. Barnard: Yes, we will agree to that.

Mr. Bird: And that they filed written request with the Secretary of Labor?

Mr. Barnard: Yes, it is so stipulated.

Mr. Bird: So the only question before the Court is whether or not the lumber which these employees produced was produced for interstate commerce.

The Court: Now, I am just wondering if you could not stipulate as to what the facts are in regard to that.

Mr. Barnard: Perhaps if we might have a few minutes——

Mr. Bird: ——I think we can to a large part of the facts. [2*]

The Court: As I recall this matter there were certain shipments made by Riley Atkinson Company to firms outside of the State. Maybe you have the evidence here that can clear this up anyway.

Mr. Bird: I think the evidence will be short in this matter.

Mr. Bird: Do you people have any objections to the mathematical computations.

Mr. Barnard: No, I think we will stipulate that the computations are correct.

ELBERT SHAW

called as a witness for the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Bird:

Q. What is your name? A. Elbert Shaw.

Q. You are an investigator for the wage and hour division?

A. That's right, for the United States Department of Labor.

Q. The Bailiff has shown you some computation sheets, did you prepare those?

A. I did.

Q. Where did you get the information?

A. From the payroll records of the Idaho Lumber Company for their employees at the sawmill at Salmon, Idaho. [3]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Elbert Shaw.)

Q. What did you do with that information, how did you go about compiling it?

A. I entered the total hours worked each week as indicated in the payrolls, I entered the total amounts that had been paid, I computed the total due the worker in the amount of one-half the hourly rate indicated, at which the employee had been paid for all the hours in excess of forty in each work week.

Q. So you have a column of figures which indicated the amount due each employee for each work week if he was engaged in the production of good in interstate commerce? A. Yes.

Mr. Bird: There may be a question as to whether we should introduce the primary records as well as this summary.

The Court: I shouldn't think that would be necessary.

Mr. Barnard: No, I don't believe that is necessary.

Mr. Bird: Mr. Barnard, you would agree that the information which he copied off the record is correct?

Mr. Barnard: Yes, we have so stipulated.

The Court: Then this may be admitted, I understand it is marked as exhibit 1.

Mr. Bird: I might say that the prayer in the complaint for Mr. Horn was an approximation and these [4] figures are different; we didn't have the full payroll records on Mr. Horn when we filed the complaint.

(Testimony of Elbert Shaw.)

The Court: Do you wish to have your complaint to be amended to conform with the figures you have here?

Mr. Bird: That is a good idea.

Mr. Barnard: We have no objection.

The Court: It may be amended and those figures will be inserted by the Clerk.

Mr. Bird: That is all, you may examine.

Cross-Examination

By Mr. Barnard:

Q. Now, Mr. Shaw, in the extreme right hand column you have a column headed "wages due," and that is the amount which you found due for that week, but it is subject to the proposition of whether or not the employee was engaged in interstate commerce at that time?

A. That would be true.

Mr. Barnard: That is all.

Mr. Bird: Or in the production of goods for interstate commerce.

The Court: I understand that.

Mr. Barnard: No further questions.

A. V. JOHNSON

called by the plaintiff as an adverse party, after being first duly sworn testifies as follows: [5]

Cross-Examination

By Mr. Bird:

Q. Mr. Johnson, I show you invoices 256 and 257 which are invoices of the Idaho Forestry Products

(Testimony of A. V. Johnson.)

and ask you if you recognize them? A. Yes.

The Court: I think those should be marked.

Q. Mr. Johnson, what are those invoices?

A. They are invoices to Knudsen Builders Supply Company of Salt Lake City and a freight invoice for the same place?

Q. What is the date of those?

A. 8-30-51 on both of them.

Q. And what is the amount on the lumber?

A. \$629.07 and \$173.62 freight.

Q. And that represents a sale by the Idaho Forestry Company which is the same as the Idaho Lumber Company?

A. I might explain on that—Knudsen Builder's supply has an office here in Pocatello and we sold some lumber through them and we make a lot of purchases through them. This lumber was for an employee of theirs in their Salt Lake office and they came and asked me as a special favor would I get this out so that the man might buy lumber at the wholesale cost for his house. It was one of the employees of Knudsen's in their Salt Lake office. My dealings was with the Pocatello office with John Davis of Pocatello. [6]

Q. You knew when you sold that lumber that it was going to be delivered to Salt Lake City?

A. I did—it was as a favor and not in the course of our business.

Q. You sell lumber in the course of your business?

(Testimony of A. V. Johnson.)

A. Not to individuals at that time, it was all wholesalers.

Mr. Bird: I move to strike the answer as not responsive as far as the course of his business is concerned.

The Court: Yes, it may be stricken.

Q. You knew that it was to be delivered to Salt Lake City, Utah? A. Yes, sir.

Mr. Bird: I ask to have that introduced in evidence.

The Court: It may be admitted.

Q. Now, I will show you invoices 1457, 1543, 1153, 1239, 1258, 1304, 1321, 1406, 1444, 1471, 1484 and ask you if those are invoices representing sales by your Company to be delivered out of State?

A. These tickets—the sale on this was between Roger Brothers Seed Company and myself, it was made in Idaho Falls in Rod Rose's office. I took and had the purchase order changed over to Riley Atkinson's for the financial arrangement. I needed help to produce the job. It is all [7] one sale and it was delivered out of the State.

Q. You knew at the time that the lumber left your premises that it was going to go outside the State?

A. It was sold in Idaho, to an Idaho corporation for delivery out of the State.

Q. You knew at the time the lumber left your business that it was going out of the State?

A. At the original time I was not supposed to

(Testimony of A. V. Johnson.)

take it out. I was to sell it to Roger Brothers and it was later arranged that I take it out.

Q. I am talking about when the lumber left your mill. You at that time knew that it was going outside of the State? A. That is right.

A. And your own records show that it was going outside the State, that is right?

A. That is right.

Q. And those invoices total \$11,561.49?

A. I assume that to be right.

Q. Now, the dates shown on those invoices, what are those dates?

A. Those are the dates that it was billed out, the date it was loaded, in other words.

Q. Now, all of this lumber shown on your invoices is lumber produced at the Salmon sawmill?

A. That is right.

Mr. Bird: I ask that these be introduced in evidence. [8]

The Court: They may be admitted. All of them are marked as one exhibit—Exhibit 4.

Q. I will next show you a series of invoices and copies of invoices which have been marked as Exhibit 5, will you explain what those are?

A. The first one is to Rice-Welker, a millwork concern in Boise. It was handled out of Riley Atkinson's office. Almost all of my business was done with Riley Atkinson's Idaho Falls Office through Mr. Cook and he asked me to send this and it went to a Boise millwork house and I assumed that it was within the state, which it is. My arrangements

(Testimony of A. V. Johnson.)

with Mr. Cook at Riley Atkinson's was that we were to not get that sawmill involved in anything that would be construed as interstate, and my arrangements were with him and we have delivered all of the lumber and sold probably eighty per cent of it and used Riley Atkinson's for the financial convenience.

Q. When you delivered that lumber did you know——

A. I knew right exactly where it was going.

Q. I didn't finish my question.

A. Excuse me.

Q. When you delivered or sold this lumber did you know that the firm which produced the articles was going to ship some of the goods which they made from this lumber, outside of the state? [9]

A. I talked to Daryl Cook about it and he said that it was a very similar outfit to the one we operate at Idaho Falls and there was no reason to assume that any portion of it would go out of the State, it is on local construction within Boise—the millwork.

Mr. Bird: Can we agree that Riley Atkinson's records show that some one hundred and odd dollars worth of windows made by this company were sold out of the state?

Mr. Barnard: We will stipulate this: That the defendant sold the lumber represented by these two invoices to the Wood Products Company and the Rice-Welker Millwork Company which is one and the same concern, that is, they changed their name

(Testimony of A. V. Johnson.)

after the first shipment, and that they manufacture millwork and that some of the products of that company—window sash and some thing of that sort has been shipped out of the state, but we have no knowledge as to whether or not any of this lumber—this particular lumber went into those sash or doors.

Mr. Bird: It is so stipulated.

The Court: And the exhibit may be admitted.

Q. Now, I show you your invoice 1184 which has attached to it a copy of an order from Riley Atkinson and ask you if you recognize that—first I will have it marked Exhibit 6 for identification. [10]

A. I don't recognize this order—I don't definitely remember this but I assume it is correct.

Q. Is there any way in which you can check your records and know whether you received an order from Riley Atkinson, of which that white paper is a copy?

A. No, there would only be the one copy and they are thrown away but we assume it to be right.

Mr. Bird: Will you agree to that Mr. Barnard?

Mr. Barnard: We will stipulate that they received an order from Riley Atkinson in accordance with that instrument there for pickup at the mill.

Mr. Bird: Then it is so stipulated, that is, with reference to the white paper.

Q. Now, that, on its face shows that the purchaser of the lumber, which was to be sold from your mill, was an out of state concern?

A. In that instance, yes.

Q. And did you find out when you sold it whether

(Testimony of A. V. Johnson.)

or not the lumber was going to go outside the state?

A. No, I didn't, but there is some things that just passes me I can't tend to everything.

The Court: That exhibit may be admitted. I believe that was referred to as Exhibit 6, I notice it is marked as 3-A.

Mr. Bird: That is right.

Q. Mr. Johnson, was there any change in the type of your [11] business or the nature of your customers this spring, at the time concerning which we made this stipulation—had your business changed so that you were selling—

The Court: Was this after this action?

Mr. Bird: Yes.

The Court: It would not be material here.

Mr. Bird: I thought it might if it was shown that the conditions hadn't changed as to the amount of goods being sold and so on.

The Court: I don't think it would be material, of course, if there is no objection—

Mr. Barnard: I was about to object but I thought that he had not finished his question, I didn't know just what he was leading up to.

The Court: I have already ruled and it is useless to make your objection. This is a good deal like a railroad company having an accident and then later go out and fix things up after the wreck.

Q. Well now, Mr. Johnson, you produced lumber during the winter time and stockpiled it for sale in the summer time is that correct?

A. That is right.

(Testimony of A. V. Johnson.)

Q. In other words, you cut more lumber during the winter time than you sell?

A. That is right. [12]

The Court: I notice the last exhibit which I called your attention to—that exhibit is attached to another which at some time had been marked 3-a but the exhibit is numbered 6 here.

Q. Now, the lumber which went into these pallets and bean boxes which were sold to Roger Brothers Seed Company which sales are shown on the orders and invoices, that lumber was produced, starting in December, January and February?

Mr. Barnard: That is objected to on the ground that it is immaterial unless the defendant knew at the time the lumber was produced that it was going to be produced for something going out of the state. If he had knowledge that it was going out of the state or the products made from it were going out of the state, then he would be under the coverage of the act, but until he has that knowledge, no matter if it does go out of the state later, of course, he is not chargeable with it at that time.

The Court: He may answer.

A. I don't believe that I had the order on Rogers Brothers in February if my memory serves me correctly, and those were made out of fir which dries very fast—our drying lumber is generally all yellow pine, and the fir, there is no reason for carrying it that length of time.

Q. Your own records show that in March you

(Testimony of A. V. Johnson.)

assigned lumber to be used for these bean boxes? [13]

A. That's approximately right—that is when we got the order but we never had any intention, and we never cut any until that time.

Q. You admit that at least in March you were producing lumber—that sawmill up there was producing lumber which was used in these bean boxes?

A. That's right.

Q. Now, do you keep lumber segregated as between lumber which you sell outside of the state and lumber which you sell in the state?

A. In that instance, yes.

Q. You kept a separate pile for every stick of lumber that went outside of the state?

A. That's right. Riley Atkinson advanced us the money and they were marked by numbers with a tab on the end of them and they were marked "for bean boxes," and they advanced the money on them.

Q. They advanced money on other lumber too didn't they?

A. That is right, that was all Ponderosa pine and none of that, I know, could have went in the bean boxes because they was all fir, and the fir that was produced prior to that in the winter was shipped as surfaced green and rough, that came out of production before that time. It is very seldom that a fir board will remain there over thirty days.

Q. What I am getting at is this—did you mark this lumber [14] in separate piles because Riley

(Testimony of A. V. Johnson.)

Atkinson had loaned the money on it or because you expected that it was going out of the state?

A. Because Riley Atkinson had loaned the money on it.

Q. So you made no segregation between the lumber that you expected to go outside the state and the lumber which you expected to sell locally?

A. We expected to send no lumber out of the state.

Q. Did you make any segregation between the employees who work on the lumber that went outside of the state and the employees which worked on lumber sold in the state.

The Court: I don't think that is a fair question. I want this witness, or any witness, to have a break, he has told you that he didn't manufacture any lumber that he knew was going out of the state and you keep asking him that same question. It is kind of a catch question.

Mr. Bird: I didn't mean it that way.

The Court: No, I know that you didn't intend it that way but I don't think that he should be required to answer it after his other answers here. You may go ahead however—Mr. Reporter, you read the question to him.

(Question read by reporter.)

Mr. Bird: Perhaps I should rephrase the [15] question.

A. I will answer it.

The Court: Go ahead.

(Testimony of A. V. Johnson.)

A. We know that after I received that order we piled that lumber—Riley Atkinson made advances of money and when they advanced the money I started to pile lumber. We know that the lumber was dried approximately sixty days before we used it, so we know that we quit producing lumber for that job about sixty days before the last of the job was delivered and we made no effort whatsoever to do any interstate commerce at any time and we made every effort to avoid it.

Q. You didn't have a special group of employees to work on those boxes whether you expected them to go out or whether they did in fact go out—you didn't have a special crew that did that work and a special crew that did the rest of the work?

A. No, sir.

Q. The employees indiscriminately worked on that and worked on other items?

A. The men in the planing mill would have never worked on them. There was no reason for them to work on that job, it was done in the sawmill and the shop.

Q. Didn't they have to plane the lumber?

A. It was planed in the sticker, it was cut to length and run through the sticker in the shop, it didn't go through the planing mill. [16]

Mr. Bird: Are you contending that some of these employees had special duties to perform here.

Mr. Barnard: I don't know what their duties were, these men named.

(Testimony of A. V. Johnson.)

Q. Mr. Kramp worked on the green chain didn't he? A. That is right.

Q. So he would have worked on the lumber?

A. That is right.

Q. Now, Pierce worked around the equipment and operated the sawdust truck, is that right?

A. He hauled the wood and the sawdust and delivered it around town on local deliveries for consumption as fuel by the people of the town.

Q. He also worked cleaning up around the saws?

A. Just to get the sawdust on the truck and sweep up under the bin where he slopped it off the truck.

Q. His work in that connection would be just as much on the lumber that was used in the bean boxes as any other?

A. It was disposing of waste from the mill that was used for consumption as fuel by the towns people.

Mr. Bird: They are going behind the stipulation now—they admitted that he was engaged in the production of lumber, now they are trying to say that he wasn't.

The Court: I don't take it that way. This question that you ask now, goes to whether this man that you mentioned was engaged in doing anything in connection [17] with the manufacture of the bean boxes that were sold to the Rogers Seed Company and shipped out of the state. He answers that his job—and I assume that is for the Court to

(Testimony of A. V. Johnson.)

decide—but he answers that his job was to take the sawdust and sell it or deliver it to the local townspeople. I think he has answered it the way he understands it.

Mr. Bird: The only trouble is that I dismissed a witness—I was relying on the stipulation that he was engaged in producing lumber.

The Court: That stipulation stands. He was engaged in producing lumber.

Q. To the extent that Pierce's duties constitute the production of lumber, he was just as much engaged in the production of the lumber which was used in these bean boxes and pallets as in the production of lumber that was used for other purposes?

Mr. Barnard: That I am going to object to as a question for the Court to determine under the evidence here.

The Court: He was hauling the sawdust from all of the lumber, there is no question about that. If you want him to answer, he may—the Court has control of the matter. Go ahead and ask your questions.

Q. Was his work related only to the lumber which was sold [18] locally or was it also related just as much to the lumber that was manufactured into these bean boxes?

A. His job was the disposal of all waste from the sawmill.

Q. Now, what about Westfall?

A. He operated the planer, but he came back

(Testimony of A. V. Johnson.)

at night at their suggestion. I told them to hire some more men and they said, "let us come and do it at night, we would like to earn the extra money," and he came back at night and worked in the shop on bean boxes, that is right.

Q. Now, what about Horn?

A. I doubt that he had more than five days in there, other than the production of lumber. He operated the trimmer.

Q. He would have been——

A. He may have nailed pallets for a little while.

Q. But he would have been engaged in the production of the lumber used in the pallets and bean boxes?

A. In the production of the lumber, that's right.

Q. You made your first delivery of the pallets outside of the state sometime in May?

A. That is approximately right, yes.

Q. As shown by the invoice? A. Yes.

Q. When you made this sale—this agreement to produce these pallets and bean boxes, when was that?

A. That was in February if my memory is right. [19]

Q. In February?

A. The latter part of February.

Q. At that time did you know whether the bean boxes would be sold outside the state—when you got the order in February?

A. At that time I went over and I talked to Mr. Rose about the order and I understood when

(Testimony of A. V. Johnson.)

I went to see him that they were going to be for one of their local warehouses. I took the order subject to approval by the next day and I went over and seen some attorneys and we went and looked in those commerce clearinghouse books if there was any place that it was stipulated there that we would be engaged in interstate commerce and we couldn't find any place that it was. If it was shipping containers it was interstate commerce but this was warehouse equipment, these boxes and pallets, not to be shipped on. We couldn't find where it was specifically listed and I called them back and told them to change the order over to Riley Atkinson's company and I would accept it and bill them?

Q. Why did you tell them to change the order to Riley Atkinson?

A. For the financial arrangement—I had also talked to Daryl in the meantime.

Q. I was asking you whether when you made the order, or took the order in February, 1952, you knew whether the pallets and bean boxes were going to leave the state? A. I did. [20]

Q. Did you, at that time, know they were going to leave the state?

A. I did, it wasn't I that was to take them out but I knew that they were to leave the state.

Q. So you knew, starting in February, 1952, that your firm was producing lumber and making it into pallets and bean boxes and that those bean boxes were going to leave the state?

(Testimony of A. V. Johnson.)

A. I knew that, yes.

Q. Now, before February, 1953, did you know that some of your sales were going out of the state—for instance, this sale to Utah?

A. That one to Knudsens, yes, but I thought that one was perfectly all right. We made every effort to not be engaged in interstate commerce. We made every effort at all times.

Q. But at that particular time and in that instance you knew that you were selling goods outside the state didn't you?

A. I went up and had the law read to me that it is not in the regular course of my business that it wasn't. I had that read to me, parts of that law, several times.

Q. I am not concerned with what you thought the law was, I am concerned with what you knew the facts to be.

A. I knew that I shipped it out, right, yes.

Q. And you had made no records and made no segregation between the employees who worked on that lumber that was eventually sold out of the state and employees that didn't? [21]

A. No.

Mr. Bird: That is all.

Mr. Barnard: I believe I will reserve my questions until we open our defense.

Mr. Bird: I have no further testimony. We will rest.

The Court: You may call your first witness Mr. Barnard.

Mr. Barnard: Yes, I will call Mr. Johnson.

A. V. JOHNSON

called as a witness for the defendant, after being heretofore sworn, testified as follows:

Direct Examination

By Mr. Barnard:

Q. Mr. Johnson, these exhibits 2 and 3—the sale made at the request of the Knudsen Builders Supply Company at Salt Lake City, Utah. Did you state that the Knudsen Builders Supply Company had an office in Pocatello?

A. That is right.

Q. Did you have considerable business with that concern at their Pocatello office?

A. Yes, at one time we started selling them lumber, they sold four or five loads around Ketchum and like that, but their loads were so specified that we just couldn't handle them—we do a lot of wholesale buying from them in our Idaho Falls operation, plywood and such items. [22]

Q. Explain where the request came from, and the circumstances regarding those two invoices, exhibits two and three?

A. John Davis called me up and asked me to send this and I told him that I wouldn't, and he said that Art Knudsen of Salt Lake asked to have it sent down as a favor to an employee to help him secure a home to live in, and I said "well I will take it."

Q. Now then, was that operation in the ordinary and usual course of your business?

(Testimony of A. V. Johnson.)

Mr. Bird: We object to that on the ground that it calls for an opinion and conclusion of the witness, he has already testified that his business is selling lumber.

The Court: Didn't you ask him that same question?

Mr. Bird: No, I objected to it and asked to have it stricken as not responsive.

The Court: I think I understand this transaction. He has said that he sold it to them and they asked him to ship it out of the state, he knew that—you may proceed.

Q. In the course of your business, from the time it began up there, Mr. Johnson, have you ever had any other similar transaction? A. No.

Mr. Bird: I should have spoken sooner, but [23] I do want to object to that question on the ground of vagueness, I don't know what he means by similar transactions.

Mr. Barnard: Perhaps I can clear it up.

Q. Incidents, Mr. Johnson, where you were performing any favor to anybody, favors of that nature?

Mr. Bird: I object to that on the ground that it is irrelevant and immaterial.

Mr. Barnard: I think that is the point here your Honor—this is a special transaction.

The Court: The Court has control of this matter, I will let him answer.

A. Our connection with Knudsen Builders Supply was——

(Testimony of A. V. Johnson.)

Q. The question was, have you ever done that for any other concern during the entire course of your business?

A. No—our business was selling through these wholesalers to retail lumber dealers, except to John Homer of Idaho Falls which deal was that he was building a housing project and he helped me on the financial arrangements when we put the mill in and I told the lumber dealers when I started the mill that he would have to be excluded from our arrangements, that he got his lumber regardless. That was all delivered in Idaho Falls, it was an Idaho Falls building project. This deal was a favor to an employee and the others were all to lumber yards for resale in their local communities. [24]

Mr. Bird: The witness has answered the question but he answered a lot of other questions too, and I did not have a chance to object and I now move to strike insofar as it the rest of the sales are concerned.

The Court: I will let it stand subject to your objection and I will consider it as to its materiality when I consider the case.

Q. Calling your attention to Exhibit 5, do you have any knowledge Mr. Johnson that any part of the lumber shipped on the invoices which went to Boise, ever went out of the state?

A. No.

Q. When you shipped that lumber did you have any information in any way that it might be shipped out of the state?

(Testimony of A. V. Johnson.)

A. No, if I had I wouldn't have shipped it.

Q. I show you Plaintiff's Exhibit 6 and ask you where that lumber was delivered as far as you are concerned?

A. I do not know.

Q. Can you state whether it was picked up at your mill?

A. It was because of the invoice.

Q. You had nothing to do with shipping it out of the state or anything of that kind?

A. I did not.

Q. Do you know where it went?

A. I do not. [25]

Mr. Bird: That is which invoice now?

A. This is Norman Thompson Lumber Company, Warren, Utah.

Q. Do you recall that particular transaction?

A. I do not.

Q. To refresh your memory—strike that—I show you now Exhibit 4, the invoice covering the pallets and bean boxes, I will ask you how many contracts you had with the Rogers Brothers Seed Company?

A. One.

Q. And were all those shipments made pursuant to that one contract?

A. That's right.

Q. Were some of the pallets and bean boxes under the original contract delivered in Idaho Falls?

A. Right.

Q. And these others represented by these invoices did go outside the state?

A. That's right.

Mr. Barnard: That is all, you may examine.

(Testimony of A. V. Johnson.)

Cross-Examination

By Mr. Bird:

Q. Mr. Johnson, you sell to a lot of different customers don't you?

A. No, there was very few, now we have branched out more—the lumber yards couldn't take our output and we have had to go right to the customer to unload our production. [26]

Q. During this period of 1951 and 1952 you sold lumber which was delivered to a good many different firms?

A. Almost the entire amount went through Riley Atkinson because he was making financial arrangements, I had to have the money the minute the lumber was produced.

Q. Who sold it.

A. I sold most of it and took the orders to Riley Atkinson and they wrote another order on it and approved the credit on it and I delivered it.

Q. You sold it to a lot of different firms didn't you?

A. Mostly in Pocatello and Idaho Falls and the Ketchum Builders Supply.

Q. Did you personally inquire as to what each one of these customers was going to do so as to make sure that none of this lumber left the state?

A. I knew the nature of their businesses. I had no reason to believe that anything would leave the state.

Q. It is true isn't it that Idaho produces a lot more lumber than it uses within the state?

(Testimony of A. V. Johnson.)

A. That's right.

Q. You knew that was true?

A. That is right.

Q. It is a lumber exporting state?

A. That is right.

Q. I would like to know how you determined, if you did [27] with certainty that your lumber didn't leave the state?

A. At Salmon that is a very small community and there is a very limited amount of lumber and the very maximum that I can hope to get on the present forest service quota is two million feet, and I set up for four million—when we done it we expected the quota to be increased and I knew that any place that I delivered outside of the state I would have to deliver from Salmon to the rail head for no compensation. I could only get the same price at the rail head as Bonner, Missoula or Darby or any of those other places.

Q. I am not asking you how you knew who you delivered it to, I am asking how you could have known to a certainty that none of the people that bought it from you sent it outside or kept it in Idaho?

The Court: That's what I thought he was explaining. However, if you don't want that I will stop him.

Q. You understand my question?

A. Yes, I knew that when I built that sawmill that all my production from the sawmill had to be trucked out. It was the only way we could operate

(Testimony of A. V. Johnson.)

because we couldn't stand the cost that we would lose from Salmon to the rail head. I knew that it all had to be trucked and by that basis I selected where I was going to sell it and I sold it there to try to stay away from interstate commerce. [28]

Q. I still don't understand how you knew whether some of your customers might not ship some of this lumber outside the state?

A. A customer might come down from Jackson, Wyoming and go into the lumber yard at Idaho Falls and buy a two by four and haul it back to Jackson—there are several sawmills in Jackson, and that would be the only place I know of that it might go.

Q. This Rice Welker Company, you knew about them didn't you?

A. That was a millwork concern in Boise and doing very similar work to what we do, custom work on housing projects, I had no reason to believe that it was going out of the state.

Q. I don't understand which you are contending for—one that a mill like yours would be normally expected only to have its customers within the state because of your locality and economic setup or whether you actually went around and checked to make sure.

A. No I didn't. I know the nature of the people's business that I sold to and I tried to confine it to the ones that I knew the nature of their business, that there should be no question.

(Testimony of A. V. Johnson.)

Q. But at the same time you were producing and manufacturing these pallets and bean boxes which you knew were going outside the state? [29]

A. Yes, and I thought that I had checked to my satisfaction that it wasn't in the regular course of our business, and that it was something that we could do with that building that was setting vacant that we didn't have money enough to open up and there was some salvage there.

Q. Did you think you could sell lumber to someone who was in Idaho that you wouldn't be covered by the Fair Labor Standards Act even though they shipped it outside the state?

A. If they shipped it out unbeknown to me.

The Court: I think we have covered that fully. He has been asked that a good many times.

Q. I would like to get it clear, I really don't understand you. Did you think that the fact that the sale occurred within Idaho was enough to prevent the Fair Labor Standards Act from applying to employees engaged in producing the lumber?

A. On the boxes, yes, because Rogers Brothers moved their equipment from warehouse to warehouse and there is nothing in my knowledge that it might not wind up in Idaho any more than in Colfax. They sent them there at that time to harvest beans with and they harvest beans in Idaho Falls afterward. I had no reason to believe that they wouldn't come to Idaho Falls—they told me that in their north Idaho Falls plant they were going to use boxes.

(Testimony of A. V. Johnson.)

Q. Maybe I misunderstood your earlier testimony. I thought you said that in February when you took the order that [30] you knew that they were going to be shipped out of the state?

A. We knew where they were going to be used first, that's right, that they were going to be used in Colfax, Washington, to harvest beans.

Q. Then you thought the fact that you sold them here would keep the Fair Labor Standards Act from applying even though the good were shipped to Colfax?

A. I have too many things to do to think of all them things.

Q. Mr. Johnson, your reason for restricting the sales of lumber to people in Idaho was because you didn't want to have the Fair Labor Standards Act apply, is that correct? A. That is right.

Q. Did you think that the fact that the sale was made in Idaho would keep the Fair Labor Standards Act from applying?

A. I thought it was up to me to see that I didn't get into anything that went out of the state if I knew it, that is the way that I felt about it.

Q. You knew that the pallets were going out?

A. That is right, and I also went up and checked on it and we couldn't find any place where it was specifically covered. If it was shipping containers, yes—but it was warehouse equipment and we couldn't find anything on it.

Q. So far as the pallets and the bean boxes were concerned [31] you thought that the Fair Labor

(Testimony of A. V. Johnson.)

Standards Act wouldn't apply if you made the sale in Idaho even though the goods went outside the state? A. I didn't know.

Q. You thought so? A. I thought so.

Q. So far as the lumber was concerned did you think that the Fair Labor Standards Act wouldn't apply if the sale was made in Idaho even though the goods went outside the state?

A. No, I knew that I shouldn't send it out of the state and I made every effort to prevent it.

Q. You thought there was some distinction then between bean boxes and pallets and the lumber?

A. As they were warehouse equipment, yes.

Q. How long were the employees engaged in working on these bean boxes and pallets from the time they started making the lumber until they finished the boxes?

A. The sawmill itself would be about two months before the first delivery and would have ended about two months before the last delivery, and the shop itself probably about two weeks before the first delivery and until the day of the last delivery.

The Court: We will take a recess at this time for ten minutes. [32]

December 10, 1953—3:50 P.M.

Q. Then to clear up this business about the bean boxes—the lumber employees started to work on the bean boxes in March?

A. That is right.

Q. That is, the lumber for the bean boxes?

(Testimony of A. V. Johnson.)

A. Right.

Q. And they worked up to within two months of the last delivery? A. Right.

Q. And the shop employees worked, starting when?

A. About two weeks before the first delivery, until the date of the last delivery.

Q. Westfall worked in the shop?

A. At night—he worked in the planer in the day time and came back over there in the evening and worked there in the evening.

Q. The other three, Kramp, Horn and Pierce, they worked where?

A. They worked in the sawmill.

Q. After August what was your intention with respect to the sale of goods—of lumber which would result in goods which would be delivered outside the state. Did you at that time intend to and expect to sell lumber which would be delivered outside the state if you got a purchase order?

A. At no time did I expect to sell lumber outside the state.

Q. You did sell lumber outside the state? [33]

A. Those were isolated cases.

Q. Did you intend to make similar sales which you considered isolated? A. No.

Q. You intended to change your practice and not make any such sales?

The Court: That is not a fair question. I don't like that kind of question, this witness is not a

(Testimony of A. V. Johnson.)

lawyer, he is just a sawmill man here. I think the Court has to protect a witness a little against such questions. That's asking him if he intended to change the way he was doing business.

Q. Did you intend to change your practice with respect to selling lumber which would be delivered outside the state?

The Court: That is the same question and I don't like it, it is asking him to plead guilty to the fact that he was making such sales. Go ahead, there was no objection but I don't like those questions.

A. I never intended to sell any outside the state.

Mr. Bird: That is one of the basic problems in this case your Honor.

The Court: Yes, I know it is a basic problem but this man is a witness here on this witness stand and [34] you are an able attorney, this again is like the old question, asking a man if he is going to quit beating his wife and you expect an answer to it with a yes or no answer. Your question infers that he should plead guilty to what you are charging him with here. I don't like that method of questioning a witness. You go ahead, you know how you should ask your questions just as well as the Court does.

Q. After you completed delivery on this bean box order did you change your sale policy in any way?

A. My sale policy was always to do business within the state. On a lot of these orders I went

(Testimony of A. V. Johnson.)

direct to the contractor or the builder of these projects and I sold the lumber to the managers of these projects through such and such a lumber company, I picked up the requisition there and took it over to Riley Atkinson's and got the credit approved, I filled the order and it was billed through Riley Atkinson, billed to the lumber yard and I took it direct to the project, that was the largest portion of our business, those housing projects in Idaho Falls and Blackfoot and Pocatello.

Mr. Bird: What I am trying to bring out is——

The Court: I understand what you are trying to bring out and I am going to let him answer if they do not object but I don't think the questions are fair questions. [35]

Q. Up until you finished this order you made some sales of lumber which you knew were going outside the state, now, were you, starting in August, were you going to have absolutely a blanket rule where no sales were going to be made where the lumber might go outside the state?

The Court: Now, Mr. Bird, if he answers that question any way that he could possibly answer it—it is a double barreled question and any way he answers it he would have to admit that he was selling lumber outside the state.

Mr. Bird: He has already admitted that.

The Court: It is not for you to say how the Court would interpret his testimony. I will not interfere with your examination any more, however,

(Testimony of A. V. Johnson.)

I think I should say again, I am sure you know what questions you should ask this witness.

Mr. Bird: I will make one more statement to attempt to clear this matter. I have his answer saying that it is his policy not to ever make any sales outside the state and at the same time I have the fact that he made out of state sales and I am trying to show that it was a policy that wasn't strictly adhered to and that he did expect to adhere to it strictly in the future. Do you get my point, your Honor?

The Court: I think I have been able to follow you all right, and I was only thinking of the form of [36] your questions, however, as I say, I am not going to interfere with you any more. Now, go ahead.

Q. Mr. Johnson, you didn't adhere strictly to a rule of not selling outside of the state?

A. My policy was not to sell any lumber out of the state, I probably made a mistake. I sold one out of the state but my policy afterward was not to sell any lumber out of the state, and it was my policy before but I deviated just to help a friend.

Q. You are talking now about the Salt Lake City deal? A. That is right.

Q. With respect to the pallets and the bean boxes you also deviated?

A. I have already answered that.

Mr. Bird: I have no further questions.

(Testimony of A. V. Johnson.)

Redirect Examination

By Mr. Barnard:

Q. Now, Mr. Johnson, after you finished with the pallets and the bean boxes, did you make any further sales of any kind that, to your knowledge, went outside the state.

A. I did not until this winter sometime when we were on this forty-hour week and I sent a load to Denver.

The Court: No, I would strike that——

Q. Mr. Johnson, I am speaking of the period after you finished the bean boxes and the pallets, prior to the time this action was commenced? [37]

A. No, we didn't make any policy to sell anything outside.

Q. Did you manufacture anything other than these bean boxes and pallets during this period of time, and just plain lumber. Did you manufacture any articles?

A. Lumber and lumber products—we made survey stakes and panels which were mostly used in our shop in Idaho Falls, moulding and such things as that—very small amounts.

Q. I am speaking of your operation at Salmon, did you ever do any other manufacturing there other than these pallets and bean boxes?

A. No—we built three or four cabinets around the town there—probably a couple of them.

Q. Were they installed locally? A. Yes.

Mr. Barnard: That's all.

(Testimony of A. V. Johnson.)

Recross-Examination

By Mr. Bird:

Q. Mr. Johnson, you have a building there which you call a shop don't you? A. That is right.

Q. And you regularly engaged in doing fabrication work in the shop?

A. That is our business at Idaho Falls, but I never could get money enough to finance it at Salmon—to open it up, no. [38]

Q. Is that shop building where you made the bean boxes? A. That is right.

Q. You still have the building?

A. That is right.

Q. You are still trying to get business of a similar type—fabrication aren't you?

A. No, I can't finance that.

Q. You were trying to?

A. I never tried to. I took this one job because it was large enough so I could get help from Riley Atkinson on the financing of it.

Q. You are testifying that you have fully equipped shop up there and have no intention of using it?

A. We had intentions when we started but we ran out of money too early. We had to buy logging equipment that we originally didn't intend to buy and that took the money that we were to operate the shop with.

Q. So you were going to let that shop lay idle?

A. That is right. I loaded up a large portion

(Testimony of A. V. Johnson.)

of the equipment and hauled it to our shop in Idaho Falls.

Q. When did you do that?

A. Must have been around a year ago.

Q. That would be December of last year?

A. Last winter some time.

Q. But your equipment was up there until last December? [39]

A. That's right—I hauled all the sash making equipment out.

Mr. Bird: That's all.

Mr. Barnard: That is all.

The Court: What was the amount of your business in 1951? A. At Salmon.

The Court: Yes.

A. Could I have Mrs. Johnson answer that—I don't know.

Mr. Barnard: I intended to call Mrs. Johnson, your Honor.

RULA JOHNSON

called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Barnard:

Q. Your name is Rula Johnson?

A. Yes, sir.

Q. What is your connection with the Idaho Lumber Company?

(Testimony of Rula Johnson.)

A. I am secretary-treasurer and I keep the books.

Q. Have you kept the books ever since the company started? A. Yes.

Q. When did the company start in business at Salmon?

A. We bought the property in August of 1950 and probably the first sale would have been in September.

Q. In September, 1950? A. Yes, sir. [40]

Q. Mrs. Johnson, have you calculated the total volume of sales from the time the company opened until December, 1952? A. Yes, sir.

Q. What, approximately, is the total volume of sales, including freight, for that period?

A. \$234,000.00.

Q. \$234,000.00.

A. I think that is the figure.

Q. Does that include the freight charged made to the customers? A. All the income, yes.

Q. Do you know approximately what the volume of sales was during the year 1951?

A. Just over a hundred thousand probably \$110,000.00.

Q. Do you know approximately the volume of sale during the year 1952?

A. I think probably \$120,000.00.

Mr. Barnard: That is all.

(Testimony of Rula Johnson.)

Cross-Examination

By Mr. Bird:

Mr. Bird: At a previous hearing we ran a tape and made a total of monthly sales; there was a discrepancy between the tape and this figure because ours didn't [41] include the freight. I would like to have this as a part of the record?

Mr. Barnard: That is no objection.

The Court: It may be admitted.

Mr. Bird: It may be marked as the next exhibit in order and it is agreed that it shows the monthly total and the yearly total of the sales of goods. It doesn't include certain miscellaneous income and freight bills which her figures include?

The Court: I think I understand, you may proceed. I don't think it is very important.

Mr. Bird: I have no questions.

Mr. Barnard: The defendant rests.

Mr. Bird: I have nothing further.

The Court: There is no necessity of a transcript in this case, it is submitted mostly on exhibits with only the two witnesses.

(Remarks of counsel as to time for filing briefs.)

The Court: You may have thirty days, and thirty days to reply and then fifteen if there is any necessity for further reply to the defendant's [42] brief.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court in and for the District of Idaho, and

I further certify that I am the person who took in shorthand, the evidence submitted and the proceedings had in and about the trial of the above-entitled cause, and

I further certify that I thereafter transcribed the same into longhand (typing) and that the foregoing transcript consisting of pages number to 42 is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof, I have hereunto set my hand this 3rd day of May, 1954.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed May 21, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby

certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Summons with Marshal's Return thereon.
3. Answer.
4. Stipulation and Order Substituting Plaintiff.
5. Stipulation and Order transferring to Eastern Division of the District of Idaho.
6. Minute Entry of November 20, 1953.
7. Minute Entry of December 10, 1953.
8. Memorandum Opinion, filed March 9, 1954.
9. Findings of Fact, Conclusions of Law and Judgment.
10. Notice of Appeal.
11. Designation of Contents of Record on Appeal.
12. Order Extending Time for Filing Appeal.
13. Original Exhibits Nos. 1 to 7, inclusive.
14. Transcript of the Evidence.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 28th day of June, 1954.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 14406. United States Court of Appeals for the Ninth Circuit. James P. Mitchell, Secretary of Labor, United State Department of Labor, Appellant, vs. Idaho Lumber Company, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed June 30, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14406

JAMES P. MITCHELL, SECRETARY OF
LABOR, UNITED STATES DEPARTMENT
OF LABOR,

Appellant,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 17(6) of the Rules of this Court, appellant makes the following statement of the points on which he intends to rely:

1. The lower court erred in making Findings of Facts Nos. 4 and 5 and in making its Conclusions of Law.

2. The lower court erred in failing to find as a fact that appellee's employees who were engaged in the production of goods, some portion of which appellee knew or had reasonable grounds to anticipate would move outside the state, were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

3. The lower court erred in failing to conclude, as a matter of law, that appellee's employees were engaged in the production of goods for commerce within the meaning of the Fair Labor Standard Act.

4. The lower court erred in dismissing the complaint and in failing to grant the judgment for back wages prayed for in the complaint.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ BESSIE MARGOLIN,
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[Endorsed]: Filed July 27, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO ORIGINAL EXHIBITS

The parties hereto respectfully request that the following designated exhibits be considered by the Court in their original form, and that the Court dispense with their reproduction in the printed transcript of the record:

Plaintiff-Appellant's Exhibits 1, 2, 3, 4, 5, 6 and 7.

Dated: August 13, 1954.

/s/ STUART ROTHMAN,
Solicitor;

/s/ BESSIE MARGOLIN,
Chief of Appellate Litigation;

/s/ KENNETH C. ROBERTSON,
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[Endorsed]: Filed August 18, 1954.

No. 14406

**In the United States Court of Appeals
for the Ninth Circuit**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT**

v.

IDAHO LUMBER COMPANY, A CORPORATION, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, EASTERN DIVISION**

BRIEF FOR APPELLANT

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In the United States Court of Appeals for the Ninth Circuit

No. 14406

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT

v.

IDAHO LUMBER COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the District of Idaho, Eastern Division, dismissing an action brought by the Secretary of Labor under Section 16 (c) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060; as amended in 1949 by c. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.) 201 *et seq.*,¹ to recover unpaid overtime compensation due and owing to appellee's employees named in the complaint (R. 3). The final judgment was entered on March 30, 1954 (R. 20). Notice of appeal to this Court was filed on May 19, 1954 (R. 20).

¹The pertinent statutory provisions are printed in full in the Appendix, *infra*. p. 16.

As set forth in the complaint (R. 4), the district court had jurisdiction under Section 16 (c) of the Act and 28 U. S. C. (1952 ed.) 1337. This Court has jurisdiction to determine the appeal under 28 U. S. C. (1952 ed.) 1291 and 1294 (1).

STATEMENT OF THE CASE

There appears to be no dispute regarding the essential facts. Appellee is engaged at Salmon, Idaho, in the operation of a sawmill and planing mill for the production, sale and distribution of green and finished lumber (Finding of Fact No. 2, R. 18). This action, which was initiated after the employees named in the complaint (Laverne F. Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn) filed written requests that the Secretary of Labor bring this action on their behalf (Finding of Fact No. 3, R. 18; Stipulation, R. 22), seeks to recover unpaid overtime compensation only for the periods of time in which the employees undisputedly were engaged in the production of some goods for out-of-State shipment (Finding of Fact No. 4, R. 18-19; R. 27-28).

The undisputed evidence reveals, and the district court found as a fact, that during the times covered by this action appellee had been engaged in the production of lumber and lumber products consisting of a quantity of bean boxes and pallets which were shipped to seed processing plants of the Rogers Brothers Seed Company located outside the State of Idaho (Finding of Fact No. 4, R. 18-19; R. 28). Appellee's president testified that he knew the pallets and bean boxes were to be delivered outside the State of Idaho

when he took the Rogers Brothers order in February 1952 (R. 39-40), and that the lumber used in the manufacture of the bean boxes and pallets was produced in the Salmon, Idaho, mill after the order had been taken (R. 50-51).

It is undisputed that Kramp, Pierce and Horn were employed in the production of lumber for the Rogers Brothers order for the workweek ending March 28, 1952 (approximately two months before the first out-of-State shipment), through the workweeks ending May 30, 1952 (approximately two months before the last out-of-State shipment), and that Westfall was employed in the manufacture of bean boxes and pallets for the workweek ending May 9, 1952 (approximately two weeks before the first out-of-State shipment), through the workweeks ending August 28, 1952 (approximately the date of the last out-of-State shipment) (R. 50-51, and plaintiff's Exhibit No. 4). It is further undisputed that the amounts claimed to be due and owing to the employees (as shown on Plaintiff's Exhibit No. 1) as overtime for hours worked in excess of 40 hours per week are correct for the workweeks during which the employees were engaged in the production of lumber or lumber products for out-of-State shipment to the Rogers Brothers Seed Company (Stipulation, R. 22-23).

Out-of-State shipments of pallets and bean boxes were made almost weekly for the period from May 21, 1952, until August 25, 1952. Appellee's gross sales for the months of May, June, July, and August 1952, totalled approximately \$80,000 (Plaintiff's Exhibit

No. 7), of which \$11,561.49 worth, or over 14%, was for pallets and bean boxes which were produced for shipment outside of the State of Idaho (Plaintiff's Exhibit No. 4; R. 28).

The district court, while finding that "lumber or productions" consisting of a quantity of pallets and bean boxes were shipped outside the State, concluded that since the goods were produced under a single contract, the contract constituted "*an isolated transaction outside of the ordinary and usual course of defendant's business and operations*, and, as such, did not constitute production of goods for interstate commerce within the meaning of the Fair Labor Standards Act." (Finding of Fact No. 4, R. 18-19.) [Emphasis supplied.]

SPECIFICATION OF ERRORS

1. The court below erred in findings of fact IV and V in concluding that employees engaged during specified workweeks in the production of goods for out-of-State shipment are not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act because such goods were produced under a single contract "outside the ordinary and usual course" of the employer's business.

2. The court below erred in failing to find as a fact that employees who, during the workweeks involved in this action, were substantially engaged in the production of goods intended for interstate shipment and actually so shipped, were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

3. The court below erred in failing to conclude as a matter of law, that appellee's employees were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. The court below erred in dismissing the complaint and in failing to grant the judgment for back wages prayed for in the complaint.

ARGUMENT

Employees are entitled to the benefits of the Act for the particular workweeks in which they are engaged substantially in the production of goods for interstate shipment regardless of the fact that their employer does not ordinarily produce goods for interstate commerce

The undisputed facts here show that the three employees on behalf of whom this suit was instituted were employed, during the particular period of time covered by the complaint, in the production of lumber intended for out-of-State shipment, and actually so shipped, each week during the period in question. There can be no doubt therefore that during this period their work falls within the plain terms of the Fair Labor Standards Act.

As the Supreme Court has repeatedly emphasized, the Act applies to the interstate shipment of “‘any goods’ in the production of which ‘any employee’ was employed” *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, 184. [Emphasis supplied.] Congress “by the present Act adopted the policy of excluding from interstate commerce *all goods* produced for the commerce which do not conform to the specified labor standards” and “made no distinction as to the volume or amount of shipments in the commerce or of

production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great" (*United States v. Darby*, 312 U. S. 100 at 121, 123). [Emphasis supplied.] The decision of the court below simply ignores these plain statutory terms and policy. For obviously the total effect of short periods of production for interstate commerce by many producers like defendant here could be just as serious as the total effect of the competition of many small producers.

It is thus clear that neither the terms nor the policy of this Act provide any exemption for production of goods for interstate commerce by reason of the fact that the employer does not always or ordinarily produce for interstate shipment. On the contrary, it is now too well settled for argument that it is the *employee's* work, and *not the character of the employer's business*, that determines the applicability of the Act, for "to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged" within the meaning of this Act. *Kirschbaum Co. v. Walling*, 316 U. S. 517 at 524. As the Supreme Court has pointed out "the provisions of the Act expressly make its application dependent upon the character of the *employees'* activities" even "where the employer is not himself engaged in an industry partaking of interstate commerce." [Emphasis supplied.] See *Kirschbaum Co. v. Walling*, 316 U. S.

517, at 524. "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities." *Overstreet v. North Shore Corp.*, 318 U. S. 125 at 132.

The Supreme Court's decisions also make it clear that the benefits of the Act are not to be denied on the grounds that the employer's business may be largely local and intrastate or that the employee also performs work in connection with the intrastate aspects of his employer's business. Thus in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, although the "bulk of the merchandise" handled in the warehouses was for "local disposition" (317 U. S. at 566, 570, 571-572), the Supreme Court specifically ruled:

The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co. v. Walling*, *supra*, p. 524.

This Court explicitly recognized and applied these principles in *Tipton v. Bearl Sprott*, 175 F. 2d 432, 435, where it stated:

* * * the applicability of § 7 (a) of the Act, 29 U. S. C. A. § 207 (a), is determined, not by the nature of the employer's business, but by the character of the employee's activities.

See also *Kam Koon Wan v. E. E. Black, Limited*, 188 F. 2d 558 at 562 (C. A. 9) certiorari denied, 342 U. S. 826.

Thus the fact that the employer, during *other* periods of time, or ordinarily, may not produce goods for interstate commerce is plainly not a valid reason for denying the benefits of the Act to employees for workweeks in which they did engage substantially in the production of goods for commerce.

Directly in point here is the Fifth Circuit's decision in *Bodden v. McCormick Shipping Corp.*, 188 F. 2d 773 (C. A. 5), which presented almost precisely the same "isolated transaction" point advanced here. The trial court there had held that an employee engaged in the repair and reconversion of a single surplus yacht, prior to its sale and transportation outside the State, was not within the coverage of the Act. On appeal, despite defendant's reliance on the argument that a single isolated transaction outside the regular course of an employer's business is not within the Act (see appellee's brief in *Bodden*, pp. 14-15), the Fifth Circuit reversed, stating:²

* * * Whether or not * * * the transportation of goods is "commerce" within the definition

² The Fifth Circuit's decision in the *Bodden* case is supported by numerous decisions of the Supreme Court in which isolated transactions, completely separate and apart from any business, involving the movement of goods or persons across State lines have been held to constitute "commerce." See *Caminetti v. United States*, 242 U. S. 470 (transportation of a woman for an immoral purpose, but not for commercial vice); *Gooch v. United States*, 297 U. S. 124 (transportation of a kidnapped person); *Brooks v. United States*, 267 U. S. 432 (transportation of a stolen automobile). And see *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 549, rehearing denied 323 U. S. 811, where the Supreme Court stated, "not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic. * * *."

of the Act, does not depend upon whether such transportation is in connection with a trade or business.

Moreover it is not the nature of the employer's business, but the character of the employee's work that determines the applicability of the Act. [188 F. 2d at 775.]

The court below was therefore plainly in error in relying upon the *employer's* "ordinary and usual course of * * * business and operations" to conclude that the *employees* here were not engaged in production for interstate commerce. This determination can be properly made only by reference to the employee's activities during the particular workweeks in question.

During the 15 years that the Fair Labor Standards Act has been in effect, the Act has been applied and enforced administratively on the basis that the employee's workweek is the standard for determining coverage and the amounts due underpaid employees.³ Virtually all of the courts, including this Court, seem plainly to have adopted this workweek standard.⁴ As stated in *Tobin v. Alstate Const. Co.*, 195 F. 2d 577, 580 (C. A. 3, 1952), affirmed 345 U. S. 13:

* * * As long as any individual employee spends a substantial part of the work-week in

³ Interpretative Bulletin No. 5, Wage and Hour Division, United States Department of Labor, originally issued in December 1938, par. 9, 1940 Wage Hour Manual 131; reiterated in most recent Interpretative Bulletin on General Coverage (May 1950), 29 CFR, 1953 Supp., 776.4.

⁴ See, in addition to decisions discussed in the text, *Southern California Freight Lines v. McKeown*, 148 F. 2d 890 (C. A. 9) certiorari denied, 326 U. S. 736 rehearing denied 326 U. S. 808; *Skidmore v. John J. Casale, Inc.*, 160 F. 2d 527 (C. A. 2) cer-

commerce or in the production of goods for commerce, he is entitled to the full benefits of the Act.

This ruling was reaffirmed in a very recent decision of the Fifth Circuit in *Mitchell v. Warren Oil Co.*, 213 F. 2d 273, decided May 31, 1954.

Applying the workweek standard to the instant case, it is evident that the employees here involved spent a substantial part of the specified workweeks in production of lumber for interstate commerce. It is undisputed that approximately 14% of its production during this period was shipped out of the State (Plaintiff's Ex. No. 4; R. 28 and plaintiff's Ex. No. 7). It is thus clear that the volume of interstate business during these weeks was not so small as to be outside the scope of the Act as *de minimis*. The wealth of court decisions holding the Act applicable to employees of an employer whose percentage of interstate business was much smaller than that in the instant case is almost unlimited, and includes a decision of this Court. *Southern California Freight Lines v. McKeown*, 148 F. 2d 890 (C. A.

tiorari denied, 331 U. S. 812; *Atlantic Co. v. Weaver*, 150 F. 2d 843 (C. A. 4); *Guess v. Montague*, 140 F. 2d 500, (C. A. 4); *Tobin v. Blue Channel Corp.*, 198 F. 2d 245 (C. A. 4); *McComb v. W. E. Wright Co.*, 168 F. 2d 40 (C. A. 6), certiorari denied, 335 U. S. 854; *Walling v. Crown Overall Mfg. Co.*, 149 F. 2d 152 (C. A. 6); *McComb v. Blue Star Auto Stores*, 164 F. 2d 329 (C. A. 7), certiorari denied, 332 U. S. 855; *Mid-Continent Petroleum Corp. v. Keen*, 157 F. 2d 310 (C. A. 8), affirming 63 F. Supp. 120, 137 (N. D. Iowa, 1945); *Walling v. Mutual Wholesale Food and Supply Co.*, 141 F. 2d 331 (C. A. 8); *Colbeck v. Dairyland Creamery Co.*, 70 S. D. 283, 17 N. W. (2d) 262 (Sup. Ct. S. Dak., 1945).

9), certiorari denied, 326 U. S. 736, rehearing denied, 326 U. S. 808.⁵

In the *McKeown* case, this Court held an employee to be engaged in interstate commerce under the Act since 7% of his time was spent in interstate commerce. In rejecting defendant's contention that "7% of appellee's [employee's] time spent in interstate

⁵ See also *Schmidt v. Peoples Telephone Union of Maryville*, 138 F. 2d 13 (C. A. 8), holding the Act applicable to switchboard operators where only a fraction of one percent of the company's revenue was derived from interstate calls; *Walling v. Peoples Packing Co.*, 132 F. 2d 236 (C. A. 10), certiorari denied, 318 U. S. 774, holding the Act applicable to employees in the slaughtering department of a packing house, since their work also produced by-products representing from 3 to 4 percent of the value of the total production, some of which were shipped interstate after further processing by other employers; *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C. A. 10), holding the Act applicable to an employee of a power company, only 4 percent of whose electric power was sold to consumers using it for interstate purposes; *Sun Pub. Co. v. Walling*, 140 F. 2d 445 (C. A. 6), certiorari denied, 322 U. S. 728, holding the Act applicable to employees of a newspaper, only 2 to 3 percent of whose circulation was out of the State; *Chapman v. Home Ice Co. of Memphis*, 136 F. 2d 353 (C. A. 6), certiorari denied 320 U. S. 761, holding the Act applicable to employees manufacturing ice, only approximately 7 percent of which went out of the State; *Russell Co. v. McComb*, 187 F. 2d 524 (C. A. 5), holding the Act applicable to a watchman as engaged in the production of goods for commerce, where only 7.7 percent of the goods processed at a warehouse were shipped out of the State; *Ivey v. Foremost Dairies, Inc.*, 106 F. Supp. 793 (W. D. La. 1952), affirmed 204 F. 2d 186 (C. A. 5), holding the Act applicable to employees of a dairy, only approximately seven-tenths of one percent of whose product was sold outside the State; *Walling v. May* (not officially reported), 7 W. H. Cases 239; 13 Labor Cases Para. 63,985 (E. D. Tenn., 1947), holding the Act applicable to all of the manufacturing portions of an employer's business, even though only 2.7 percent of the firm's total business was in the production of goods for interstate commerce.

commerce is so unsubstantial an amount that appellee [employee] was not engaged in interstate commerce at all within the meaning of the Act" (148 F. 2d at 891; brackets added), this Court stated:

It is true that employees whose activities merely affect interstate commerce are not within the Fair Labor Standards Act, though within the Wagner Act, 29 U. S. C. A. § 151 et seq. However, there seems no logical reason why there should be any difference in the substantiality of the amount of "affecting of" or being "in" commerce to bring employment under either act.

In this connection we have said in *National Labor Relations Board v. Cowell Portland Cement Co.*, 108 F. 2d 198, 201, "The quantity of cement shipped out of state is not de minimis merely because it is but a small percentage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire product of 14,000 barrels while alongside it another competing plant under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 percent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly * * *." ⁶

⁶ See also *Walling v. Peoples Packing Co.*, 132 F. 2d 236 at 240 (C. A. 10) where the court stated that since the Supreme Court "held in *United States v. Darby*, 312 U. S. 100, 123, * * * the Act applies to a small producer, it must equally apply to the production for commerce of a small portion of the total production of a large producer."

See also this Court's statement in its recent decision in *General Electric Co. v. Porter*, 208 F. 2d 805 at 810; certiorari denied, 347 U. S. 951.

* * * Moreover, the Act does not require that an employee be employed exclusively in the particular [covered] occupation.

The record also discloses that there was no effort here to segregate the interstate from the intrastate production (R. 35). In such a case, the only practical method for determining the applicability of the Act to employees whose interstate and intrastate duties are commingled is the method outlined by the Fourth Circuit in *Guess v. Montague*, 140 F. 2d 500, 504 (C. A. 4), where the court ruled that a *prima facie* showing, entitling an employee to the protection of the Act, is made where it appears that the employee worked in interstate as well as in intrastate business and the two classes of business were commingled in the employer's operations. The burden is then upon the employer to produce evidence that certain employees "did not render any service in connection with its interstate business."⁷

⁷ Defendant, in the court below, relied upon the decisions in *Goldberg v. Worman*, 37 F. Supp. 778 (S. D. Fla., 1941) and *Hill v. Jones*, 59 F. Supp. 569 (W. D. Ky., 1945). The *Goldberg* case involved a small bakery which made a few interstate sales amounting to about \$18.00 a week. Apart from the fact that the bakery's interstate business (which the court considered "trifling and inconsequential") is hardly comparable to the substantial volume of defendant's interstate business for the period in question here, it is noteworthy that the *Goldberg* decision was handed down on March 18, 1941, one day after the Supreme Court's decision in *United States v. Darby*, discussed, *supra*, pp. 5-6. It is obvious that the district court at that time did not have the benefit of the *Darby* decision and, of course, did not have the benefit of

It may be noted that this is not an action to restrain future violations but is one to recover wages claimed to be due under the Act during specified workweeks when the named employees were indisputably engaged in the production of goods for commerce. Whatever relevance the isolated character of the transaction may have in determining whether an injunction should issue to restrain future violations, this fact is plainly of no relevance in determining the employee's right to recover for the work weeks in which he was indisputably engaged substantially in producing goods for commerce.

The above authorities, we submit, suffice to establish the applicability of the Act to the named employees for the period covered by this action. The restriction relied on by the court below finds no sanction in the terms of the Act, is contrary to the rule that coverage must be tested by the nature of the employee's work and not by reference to the employer's business, and ignores the fact that the workweek is the standard for determining coverage, which, in the case at bar, is being sought only for specified workweeks during which the employees were admittedly engaged in the production of goods for commerce.

the more recent decision in *Mabee v. White Plains Pub. Co.*, discussed, *supra*, p. 5. The *Hill* case is similarly clearly distinguishable. There, too, the employer's interstate sales of tallow amounted to only a fraction of one percent of the employer's total business, i. e., much less than the volume of interstate sales here involved during the period in question, and, unlike the situation here, there was no showing that the specific employees involved had participated substantially in the production of the goods which went out of the state.

CONCLUSION

The decision below should be reversed, with instructions to enter a verdict that Section 7 of the Act was applicable to Westfall, Kramp, Pierce and Horn, for all working hours of each workweek of the period covered by this action, and to enter judgment for the appellant for an amount equal to the difference between the wages actually paid to Westfall, Kramp, Pierce and Horn by appellee and the amount to which they were entitled under Section 7 during the period in question.

Respectfully submitted.

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OCTOBER 1954.

APPENDIX

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938, as amended
(c. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.) sec. 201
et seq.).

MAXIMUM HOURS

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, * * *.

PENALTIES

SEC. 16. * * *

(c) The Administrator is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of

any employee to accept such payment shall, upon payment in full, constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Administrator claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Administrator may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided*, That this authority to sue shall not be used by the Administrator in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Administrator if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Administrator, unless such action is dismissed without prejudice on motion of the Administrator, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Administrator on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Administrator, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator under this subsection for the purposes of the two-year statute of limitations provided

in section 6 (a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

No. 14406

**In the United States Court of Appeals
for the Ninth Circuit**

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

IDAHO LUMBER COMPANY, A CORPORATION,
APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR APPELLEE

ALBAUGH, BLOEM, BARNARD AND SMITH
Attorneys for Appellee

FILED

NOV 5 1954

**PAUL P. O'BRIEN,
CLERK**

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Where an employer is not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, his employees are not within the coverage of the Act.

A single, isolated transaction, outside of the usual and ordinary course of an employer's business does not constitute engaging in interstate commerce within the meaning of the Act.

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APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR APPELLEE

ALBAUGH, BLOEM, BARNARD AND SMITH
Attorneys for Appellee

JURISDICTION

The nature of this action as a suit by the Administrator of the Fair Labor Standards Act to recover alleged overtime compensation and the appropriate statutory reference giving the trial court and this court's jurisdiction over actions of such nature are correctly set forth in appellant's Statement of Jurisdiction.

FACTS

Appellee can agree generally with appellant's statement of the facts of the case, as far as it goes, but there are certain omissions therein which appellee believes are material to appellee's theory of the case and to an understanding of the trial court's disposition

of the case. For that reason we present our view of the facts.

Appellee is an Idaho corporation, which owns and operates a small sawmill and planing mill near Salmon, Idaho, and a cabinet shop in Idaho Falls, Idaho. It uses a substantial part of the lumber produced at Salmon in the cabinet shop at Idaho Falls and sells the balance. In the ordinary and usual course of the company's business, this surplus was sold to retail dealers for use in local projects and occasionally to contractors constructing housing projects, all within the State of Idaho. The record shows that the corporation was wholly managed and operated by its president, A. B. Johnson.

The corporation had an arrangement with the Reilly Atkinson Company for the financing of its production and sale of lumber. Mr. Johnson personally made most of the sales, turned the orders over to Reilly Atkinson Company, which arranged the credit with the customers, and Johnson would make delivery direct to the jobs (45-47). It was Mr. Johnson's express purpose and intention to restrict the sales of the company's product to customers who would use the lumber within the State of Idaho. His reason for restricting the sales to people in Idaho was to avoid having the Fair Labor Standards Act apply. (49)

The record is quite persuasive that appellee was successful in its efforts to confine its operations to intrastate commerce within the State of Idaho during the approximately three year period of its existence prior to its becoming a party to the contract with

Rogers Brothers Seed Company, hereinafter described, and which is the only transaction which appellant now claims brought appellee's employees within the coverage of the Act during the time the contract was being fulfilled. In his complaint, appellant claimed coverage during certain other periods, based on about three other items, but the evidence apparently has satisfied appellant that such other items did not constitute production for interstate commerce within the meaning of the Act, as appellant's brief shows that his claim is now confined to the periods when the employees were engaged in production for the Rogers Brothers Seed Company contract. (3). Although not computed in his brief, appellant's statement of the periods involved and reference to the Exhibits will disclose that the amounts now claimed are \$47.00 for Sylvester Kramp, \$35.00 for Clifford Pierce, \$59.22 for Robert Horn, and \$299.76 for LaVerne Westfall.

In February of 1952, appellee entered into an agreement to manufacture a quantity of bean boxes and pallets for Rogers Brothers Seed Company. This concern is a corporation with its offices and principal place of business at Idaho Falls, Idaho. It purchases certain type of grain, including beans and peas, from growers, which it processes into various types of feed and seed. It has some of its processing plants located outside the State of Idaho. These bean boxes and pallets are in the nature of plant equipment used in handling beans and peas in the processing plants. They were not in the nature of shipping containers, but were kept in the plants themselves for use in moving and handling beans and peas therein. (48-49).

When appellee's president first obtained the order from Rogers Brothers Seed Company, he had no knowledge that the bean boxes and pallets were to go to any of the out-of-state processing plants (27-28, 39), but before any work was commenced on the production of the lumber at the Salmon sawmill, arrangements were made by the customer for appellee to deliver part of the boxes and pallets to plants outside the state (27-28).

Appellee had a building at Salmon, equipped for woodworking, which it intended eventually to put into operation fabricating cabinets and other items from lumber produced by its sawmill, similar to the operations conducted at its Idaho Falls woodworking shop, but had never been able to finance such an operation on a regular basis (56-57). A few cabinets and some survey stakes were made there, for local use around Salmon, and some panels were made there for use in the Idaho Falls shop, but that is all it was ever used for until the Rogers Brothers Seed Company contract was entered into. (55-56). Appellee determined to use this Salmon shop, however, to fabricate the bean boxes and pallets for this contract. (55-57).

The Rogers Brothers Seed Company contract originally contemplated that \$11,561.49 of the bean boxes and pallets would be delivered to the customer's out-of-state plants, but the shipping records show that the customer later ordered a change in the place of delivery from the originally intended destination to its Idaho Falls plant of between \$2,000 and \$3,000 worth, for use in the latter plant. Accordingly, between \$8,500 and \$9,500 worth of these bean boxes and pallets were all

that were actually delivered outside the State of Idaho. The production of the lumber for the bean boxes and pallets and the fabrication thereof extended over a period of five months, and appellee's employees involved in this case were engaged at various times during this period in different phases of the work, as is set forth on page 3 of appellant's brief. During this period appellee's total sales amounted to approximately \$80,000.

The trial court found that the only transaction wherein any of appellee's lumber or productions went outside the State of Idaho was the delivery of the bean boxes and pallets to Rogers Brothers Seed Company out-of-state seed processing plants, which were made under a single contract, constituting an isolated transaction outside the ordinary and usual course of defendant's business and operations, and, as such, did not constitute production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and, accordingly, none of the employees involved was engaged in such production within the meaning of that Act.

ISSUES

The only issue in the case is whether this particular transaction constituted production for interstate commerce within the meaning of the Act.

ARGUMENT

We in no way dispute the settled rule of law which appellant so fully advances that the applicability of the Fair Labor Standards Act is determined, not by the

nature of the employer's business, but by the character of the employee's activities.

It is probably somewhat axiomatic to point out that, unless the employer is engaged in some manner in production for interstate commerce, none of his employees can possibly be so engaged.

Baloc vs. Foley Bros. (D. C. Minn.) 68 Fed. Supp. 533

Fleming vs. Jacksonville Paper Co., 128 Fed. 2d, 395

It is only in cases where the employer's business enters the field of interstate commerce that the rule can have any application. Probably the greatest number of decided cases have arisen where the employer was engaged in production for both interstate and intrastate commerce, and the question to be determined was within which field any particular employee's work fell. That appears to be the question in every case cited by appellant in support of the rule.

Stated another way, there are many employers engaged in interstate commerce, but it does not necessarily follow that all of their employees are so engaged.

Clougherty vs. Vernor Co., 187 Fed. 2d, 288

Blumenthal vs. Guard Trust Co., 141 Fed. 2d

Collins vs. Ford, Bacon & Davis, Inc., 66 Fed. Supp. 424

In reading through any number of the reported cases where the question of coverage has arisen, it becomes apparent that the courts almost always first consider and state whether or not the **employer** is engaged in interstate commerce or the production of goods for interstate commerce, even though they are well aware

that coverage of any particular employee or group of employees is ultimately to be determined by the nature of the **employees'** activities. In fact, some of the courts have expressly stated that it is proper to do so.

Lewis vs. Florida P. & L. Co., 154 Fed. 2d, 751
 Oliphant vs. Kaser (Iowa Dist. Ct.) 10 Labor Cases
 62928

Round vs. N. Y. Guernsey Breeders' (N. Y.) 194
 Misc. 701

There are many cases where an employer has been found to be in interstate commerce, but not all of his employees are engaged in that phase of his business, and such employees do not come within the coverage of the Act. The Act itself contemplates that an employer may segregate his employees so that part of them may work on goods for interstate commerce and part on goods for local consumption, and coverage extends only to those who work on the goods produced for interstate commerce.

Montalvo vs. Porto Rico Tob. Corp. (D. C., P. R.)
 6 Lab. Cases 61,428

Carter vs. Royal Crown Bot. Co., (D. C., Tenn.)
 7 Lab. Cas. 61,951

Agosta vs. Rocafort (D. C., P. R.) 9 Labor Cas.
 62,610

Blanket coverage on an industry-wide basis is not within the contemplation of the Act nor the intent of Congress. Thus, it is possible that in a given industry an employer may not be subject to the Act, while another employer in the same industry may be subject to regulation with respect to part of his employees and

not others, or he may be subject to regulation with respect to all. This point is well illustrated by *Walling vs. Jacksonville Paper Co.*, 317 U. S. 564, where the court points out that it was not necessary for the plaintiff to show that **all** of the employer's business must have an interstate character. Conversely, it follows that it must be shown that **some** of it does have that character before determining that the employee's activities are connected with that part.

The courts have quite universally held that a mere incidental engagement in interstate commerce is insufficient to sustain a recovery under the Act, in determining and interpreting the intent of Congress as to the scope of the Act. Illustrative of such holdings are the cases where the "de minimis" doctrine has been applied, and where coverage under the Act has been denied employees primarily engaged in intrastate commerce, who fail to prove a **substantial** engagement in interstate commerce.

Schwartz vs. Witwater Grocery Co., 141 Fed. 2d, 341

Block's Shoe Stores vs. Walling 139 Fed. 2d 268
Mile High Poultry Farms vs. Frazier 157 Pac. 2d 125

Skidmore vs. Casale, 160 Fed. 2d, 527

Goldberg vs. Worman, 37 Fed. Supp. 778

The word "commerce" in itself implies a continuity or regularity in the flow of goods. There are many instances where the courts have refused to subject an employer to liability where the interstate aspects of his

business are relatively insignificant and inconsequential. The cases arising under the so-called "de minimis" doctrine come under this theory. Although we make no claim that the transaction involved in this case falls strictly under the "de minimis" doctrine, we do feel that the basic reasoning upon which that doctrine rests is applicable.

As is now well settled, the "percentage theory" is not a valid criterion in determining whether the de minimis doctrine will avoid the application of the Act. Under the recent decisions, any percentage of an employer's business, however small, will result in a refusal to apply the de minimis doctrine, **if there is a regular constant and consistent flow of goods in interstate commerce.** For example, the United States Supreme Court refused to apply the de minimis doctrine to **regular** shipments in interstate commerce of one-half of one per cent of the total volume of goods produced, in *Mabee vs. White Plains Pub. Co.*, 327 U. S. 178.

But where the interstate transactions are sporadic, occasional, or isolated in character, the courts have often refused to apply the Act, although a much larger percentage was involved.

Hooks vs. Nashville Brecko Block & Title Co., 39 Fed. Supp., 369

Reynolds vs. Carter, 9 So. 2d, 322

Wiley vs. Stewart Sand & Mat. Co., 206 SW 2d, 362

Schwellenbach vs. Grant, 79 Fed. Supp. 975

Goldberg vs. Worman, 37 Fed. Supp. 778

Hill vs. Jones, 59 Fed. Supp. 569

Contrary to appellant's contention, as set forth on page 9 of his brief, the trial court did not ignore the rule that coverage is to be determined by the character of the employee's activities, rather than the nature of the employer's business. Nor did the court determine that the employees were not engaged in interstate commerce merely because the "usual and ordinary" course of the employer's business was confined to intrastate commerce. It did determine that the Rogers Brothers Seed Company transaction was a **single, isolated** transaction. As such it was not in the usual and ordinary course of appellee's business. The trial court then concluded that because it was a single, isolated transaction not in the usual course of appellee's business, it did not constitute interstate commerce within the meaning of the Act. It is the only transaction of that nature which appellee ever undertook, and no claim is or can be made that appellee was otherwise engaged in interstate commerce or the production of goods for interstate commerce. The trial court simply concluded that Congress never intended the Act to subject an employer to liability whose operations were wholly confined to intrastate commerce except for some isolated unusual event. The key to the trial court's thinking is, of course, the absence of any regularity or recurrence, inherent in the very meaning of the word "commerce".

Moreover, the trial court undoubtedly took into consideration the fact that the bean boxes and pallets were not in the ordinary sense of the term "produced for commerce." In the ordinary and usual sense of that term, we think of commerce and production for com-

merce as meaning that goods are being regularly produced for sale to various wholesale or retail dealers, who, in turn, will resell them to ultimate consumers. The goods themselves continually flow into and become part of the "stream of commerce." Here we have one transaction between the producer and the ultimate consumer. We have a small manufacturer, producing wholly for local, intrastate consumption, filling a single order for some special equipment to be kept and used in the customer's plant. The customer, too, in one sense, was a local customer. Surely, Congress never intended the Act to apply to such cases, which are not commerce in any reasonable sense.

The characteristic of recurrence with some degree of regularity as an essential characteristic of "commerce" within the meaning of various Federal statutes has been inferentially, if not directly, recognized by the United States Supreme Court. As the court said, in *Swift & Co. vs. United States*, 196 U. S. 375:

"When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, **and when this is a typical, constantly recurring** course, the current thus existing is a current of commerce among the states, and the purchaser of the cattle is a part and incident of such commerce". (Emphasis added).

And in *NLRB vs. Fainblatt*, 306 U. S. 601:

"Examining the Act (National Labor Relations

Act) in the light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim **de minimis.**”

While we have never contended that the transaction here involved comes strictly under the *de minimis* doctrine, it is analogous thereto. We think the decision of the trial court soundly rests on the somewhat broader concept that the single, isolated, unusual transaction involved in this case did not substantially change the character of appellee's activities from the intrastate field. It was, of course, the right and privilege of appellee to restrict its activities to that field, even for the express purpose of avoiding the application of the Fair Labor Standards Act. We do not believe Congress ever intended that a small business concern which in good faith earnestly seeks to so limit its activities, becomes subject to this Act because a part of the production of a relatively small order, for a local customer, is used by that customer outside the state. Particularly is this true where the items involved are not really articles which will ever enter the “stream of commerce”, and will never reach the usual marts of trade.

Respectfully submitted,

ALBAUGH, BLOEM, BARNARD & SMITH

By George Barnard

Attorneys for Appellee

Idaho Falls, Idaho.

No. 14407

**United States
Court of Appeals
for the Ninth Circuit**

GILBERT LORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Fourth Division.**

FILED

OCT 27 1954

**PAUL F. O'BRIEN,
CLE**



No. 14407

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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MIKE STEPOVICH,
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Attorneys for Defendant and Appellant.

In the District Court for the District of Alaska,
Fourth Judicial Division
No. 1859 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GILBERT LORD,
Defendant.

INDICTMENT

Crime:

Ct. I. Selling intoxicating liquor without a license.

Cts. II, III, IV. Selling intoxicating liquor without a license.

Count I.

The Grand Jury charges in Count I of this Indictment:

That on the 18th day of February, 1954, in the Fairbanks Precinct, Fourth Judicial Division and Territory of Alaska, Gilbert Lord did possess and sell intoxicating liquor, to wit, two (2) bottles of whiskey. to wit, two (2) one-half ($1\frac{1}{2}$) pints of Hiram Walker Imperial Whiskey, to Fred Ross, without he, the said Gilbert Lord, having procured the necessary license to sell the said intoxicating liquor to the said Fred Ross, in violation of Sections 35-4-11 and 35-4-15(6) of the Alaska Compiled Laws Annotated, 1949.

Count II.

The Grand Jury charges in Count II of this Indictment:

That on the 19th day of February, 1954, in the Fairbanks Precinct, Fourth Judicial Division and Territory of Alaska, Gilbert Lord did possess and sell intoxicating liquor, to wit, two (2) bottles of whiskey, to wit, two (2) one-half ($1\frac{1}{2}$) pints of Hiram Walker Imperial Whiskey, to Fred Ross, without he, the said Gilbert Lord, having procured the necessary license to sell the said intoxicating liquor to the said Fred Ross, in violation of Sections 35-4-11 and 35-4-15(6) of the Alaska Compiled Laws Annotated, 1949.

Count III.

The Grand Jury charges in Count III of this Indictment:

That on the 19th day of February, 1954, in the Fairbanks Precinct, Fourth Judicial Division and Territory of Alaska, Gilbert Lord did possess and sell intoxicating liquor, to wit, one (1) four-fifths ($4/5$) bottle of wine, to Silas John, without he, the said Gilbert Lord, having procured the necessary license to sell the said intoxicating liquor to the said Silas John, in violation of Sections 35-4-11 and 35-4-15(6) of the Alaska Compiled Laws Annotated, 1949.

Count IV.

The Grand Jury charges in Count IV of this Indictment:

That on the 20th day of February, 1954, in the Fairbanks Precinct, Fourth Judicial Division and Territory of Alaska, Gilbert Lord did possess and sell intoxicating liquor, to wit, one (1) four-fifths ($4/5$) bottle of wine and one (1) four-fifths ($4/5$)

bottle of home-brewed beer, to Silas John, without he, the said Gilbert Lord, having procured the necessary license to sell the said intoxicating liquor to the said Silas John, in violation of Sections 35-4-11 and 35-4-15(6) of the Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 24th day of February, 1954.

A True Bill.

/s/ VIRGIL M. CADY,
Foreman of the Grand Jury.

/s/ GEORGE M. YEAGER,
Assistant United States
Attorney.

Witnesses before the Grand Jury:

Richard T. Lambert,
Herbert H. Wilson,
Fred Ross,
Silas John,
Norman Henry Victor Elliott.

[Endorsed]: Filed February 24, 1954.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause, do from the law and the evidence herein find:

(a) That the defendant is Guilty of the crime of selling intoxicating liquor without a license, as charged in Count I of the Indictment;

(b) That the defendant is Guilty of the crime of selling intoxicating liquor without a license as charged in Count II of the Indictment;

(c) That the defendant is Guilty of the crime of selling intoxicating liquor without a license, as charged in Count III of the Indictment;

(d) That the defendant is Guilty of the crime of selling intoxicating liquor without a license, as charged in Count IV of the Indictment.

Done at Fairbanks, Alaska, this 28th day of April, 1954.

/s/ MARTIN SMITH,
Foreman.

[Endorsed]: Filed and entered April 28, 1954.

In the District Court for the District of Alaska,
Fourth Judicial Division
No. 1859 Cr.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

GILBERT LORD,
Defendant.

JUDGMENT AND COMMITMENT

On the 4th day of May, 1954, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Selling Intoxicating Liquor Without a License, as charged in counts number One, Two, Three and Four in the Indictment on file herein; and the Court having asked the defendant, Gilbert Lord, whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant, Gilbert Lord, is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General, or his authorized representative, on the following count for the following period:

(a) On Count I, for a period of six (6) months, such sentence to commence on the 4th day of May, 1954.

It is Adjudged that the defendant pay to the Clerk of the Court the following sums on the following counts:

(a) On Count II, the sum of Five Hundred Dollars (\$500.00) assessed against him as a fine herein;

(b) On Count III, the sum of Five Hundred Dollars (\$500.00) assessed against him as a fine herein;

(c) On Count IV, the sum of Five Hundred Dollars (\$500.00) assessed against him as a fine herein;

and that said defendant be imprisoned until the payment of said fine, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal, or other qualified officer, and that the copy serve as the commitment of the defendant, Gilbert Lord, and that said defendant pay the costs of this action in the sum of \$., to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 4th day of May, 1954.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed and entered May 4, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Gilbert Lord, Ft. Yukon, Alaska, Defendant.

Julien A. Hurley and Mike Stepovich, Fairbanks, Alaska, Attorneys for Defendant.

Offense: Selling and possessing intoxicating liquor without having procured the necessary license in violation of Sections 35-4-11 and 35-4-15(6) of the Alaska Compiled Laws Annotated, 1949.

Whereas, Gilbert Lord, the above-named defendant, was duly tried and by jury's verdict convicted

of the crimes of possessing and selling intoxicating liquor without having procured the necessary license on four counts in violation of Sections 35-4-11 and 35-4-15(6), Alaska Compiled Laws Annotated, 1949, and was sentenced by the above-entitled court on the 3rd day of May, 1954, to be confined in the Federal Jail in Fairbanks, Alaska, for a period of six (6) months on Count I, and to be fined Five Hundred Dollars (\$500.00) each on Counts II, III and IV.

I, Gilbert Lord, the above-named defendant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated at Fairbanks, Alaska, this 3rd day of May, 1954.

/s/ GILBERT LORD,
Defendant.

/s/ JULIEN A. HURLEY,
/s/ MIKE STEPOVICH,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1954.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1859 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GILBERT LORD,
Defendant.

PROCEEDINGS

Appearances:

THEODORE F. STEVENS,
United States Attorney,
Attorney for the Plaintiff.

JULIEN A. HURLEY,
MIKE STEPOVICH,
Attorneys for Defendant.

April 28, 1954

(Be It Remembered, that at 10:00 a.m. upon the 28th day of April, 1954, the trial of this cause, No. 1859, was begun, the plaintiff and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of Court proceeded to call the roll.)

The Clerk: They are all present, your Honor.

The Court: This is the time set for trial in Cause Number 1859, criminal, United States vs. Gilbert Lord. Are the parties ready?

Mr. Hurley: We are ready, your Honor.

The Court: Are you ready to proceed with the trial?

Mr. Stevens: Yes, your Honor.

(At this time Mr. Stevens made a brief statement to the veniremen and Mr. Stevens and Mr. Hurley proceeded to impanel a jury.)

(A jury was duly impaneled and sworn to try the above-named cause.)

(Mr. Stevens presented his opening statement to the jury.)

(Mr. Hurley presented an opening statement to the jury.)

Mr. Stevens: The Government calls Fred Ross.

FRED ROSS

a witness called on behalf of the plaintiff, was duly sworn [4*] and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you tell us your name, please?

A. Fred Ross.

Q. Where do you live, Fred?

A. Fort Yukon.

Q. Is that in Alaska? A. Yes.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Fred Ross.)

Q. And how far is it from Fairbanks?

A. About two hundred fifty miles, or somewhere.

Q. How long have you lived in Fort Yukon?

A. Since I was born.

Q. Do you know Gilbert Lord?

A. I know him off and on.

Q. Do you know where Gilbert Lord lives in Fort Yukon? A. Yes.

Q. Calling your attention to the 18th day of February of this year, did you have occasion to go to Mr. Lord's house? A. Yes.

Q. And what time was that?

A. About, between nine and eleven.

Q. And what did you go there for?

A. Went there to buy some whiskey.

Clerk of Court: Government's Identification No. 1 and No. 2. [5]

(Two one-half pint bottles of Imperial whiskey were marked Government's Identification Nos. 1 and 2, respectively.)

Q. (By Mr. Stevens): Now, this is Government's Identification 1, Fred; will you tell us what that is? A. Half a pint of whiskey.

Q. And have you seen it before? A. Yes.

Q. When did you see that?

A. The time when I bought it from Gilbert.

Q. How much did you pay him for it?

A. Six dollars for this half a pint.

(Testimony of Fred Ross.)

Q. Is there any way to, for you to identify it; did you put any markings on it?

A. Yes, I got my initials on it, right here.

Q. Now, this is Government's Identification No. 2; will you tell us what that is, please?

A. This is another half-pint of whiskey.

Q. Have you seen that before? A. Yes.

Q. Where did you see it?

A. The time when I bought it from Gilbert.

Q. And how much did you pay Mr. Lord for that? A. Six dollars.

Q. Did you make any mark on that bottle? [6]

A. Yes, it's got my initials on it.

The Court: How did you mark up the first bottle you mentioned?

The Witness: Pardon?

The Court: What mark did you put on the first bottle that you mentioned?

The Witness: I put my initials on it.

Q. (By Mr. Stevens): And you placed your initials on both bottles? A. Yes.

Q. Did you place any other writing on them?

A. No.

Q. Now, what time was it when you bought the whiskey? A. About ten-thirty.

Q. Was there anyone with you when you went to Mr. Wilson's house? A. Yes.

Q. Pardon me, Mr. Lord's house. This is to Mr. Lord's house?

A. Mr. Lambert and Mr. Wilson were with me and they—(interrupted).

(Testimony of Fred Ross.)

Q. Did they go into the house with you?

A. No, they were out in the back waiting for me.

The Clerk: Government's Identification No. 3 and No. 4.

(Two one-half pint bottles of Imperial whiskey were marked Government's Identification Nos. 3 and 4, respectively.) [7]

Q. (By Mr. Stevens): Now, did you go back to Mr. Lord's house again that evening, or early the next morning?

A. I went there early the next morning again.

Q. About what time was that?

A. That was about one o'clock in the morning.

Q. Now, this is Government's Identification 4, Fred; have you seen that before? A. Yes.

Q. Is there anything on there that can identify the bottle for you to show that you have seen it before?

A. Yes, there is my initials on here.

Q. And where did you get that?

A. Gilbert Lord.

Q. How did you get it from him?

A. I bought it from him.

Q. How much did you pay him?

A. Six dollars.

Q. This is Government's Identification 3, Fred; would you tell us on that one, too, have you seen that before? A. Yes.

Q. And where did you see that before?

A. When I got it from Gilbert Lord.

(Testimony of Fred Ross.)

Q. And how did you get it from him?

A. I paid him for it.

Q. How much did you pay him?

A. Six dollars. [8]

Q. Is there any mark on that bottle that you can identify it by?

A. Yes, there is my initials on there.

Q. Now, when did you write your initials on these bottles? A. Right after I bought them.

Q. How did you happen to go to Gilbert Lord's place to buy whiskey?

A. Well, Mr. Lambert asked me to go there for him, so I went there.

Q. Did you know that Mr. Lord had whiskey for sale?

A. I didn't know for sure, but I went there and tried anyway.

Q. And you paid the same price for each one of these bottles, is that what you tell us?

A. Yes.

Q. Six dollars per each one? A. Yes.

Mr. Stevens: Your witness, Mr. Hurley.

Cross-Examination

By Mr. Hurley:

Q. Which ones of these bottles did you mark first? A. These two here, I think.

Q. When did you buy those two?

A. Well, between nine and eleven o'clock.

Q. You bought, how do you know—is there any difference in those bottles? [9] A. No.

(Testimony of Fred Ross.)

Q. How do you know which ones you bought first?

A. Because Stevens gave me these two here first.

Q. How do you know he did?

A. He just gave them to me.

Q. Yes, but can you tell the difference between those four bottles?

A. I can tell the difference from initials.

Q. What is the difference in your initials on the different bottles?

A. It is got time on each bottle here.

Q. It's got what?

A. Time on each bottle.

Q. The time you got the bottle? A. Yes.

Q. Where is the pen that you wrote that with?

A. It was Mr. Wilson's pen.

Q. Mr. Wilson's pen on this one; is that right?

A. Yes.

Q. And you are sure you wrote it, are you?

A. Yes.

Q. What? A. Yes.

Q. That is your handwriting? A. Yes.

Q. And who wrote the numbers on this one? [10]

A. I wrote my initials on there, too.

Q. And I see Lambert's initials on here, too; who put that on? A. Mr. Lambert.

Q. When did he put that on?

A. The same night.

Q. When was this one bought, this bottle?

A. This bottle was bought on 18 February.

Q. You didn't drink any of this whiskey?

(Testimony of Fred Ross.)

A. I tasted one of them.

Q. Yeah, that is the only one? A. Yes.

Q. What did you buy them for?

A. Well, Mr. Lambert asked me to buy them for him, so.

Q. Oh, you bought them for him? A. Yes.

Q. Oh, I see, and where was he when you bought them?

A. He was out behind Mr. Lord's place.

Q. What was he doing out there?

A. Watching me go up.

Q. Watching you go where?

A. To Mr. Lord's place.

Q. Who else was watching?

A. Mr. Wilson.

Q. And did they go in? A. No. [11]

Q. And were they watching there both times?

A. Yes.

Q. And you say Mr. Lambert give you some money? A. Yes.

Q. How much?

A. Mr. Lambert gave me ten dollars the first time and Mr. Wilson gave me twenty-five.

Q. At the same time? A. Yes.

Q. Mr. Wilson gave you twenty-five and Mr. Lambert gave you ten? A. Yes.

Q. What did you do with the change?

A. I brought it back.

Q. And who were you working for at that time?

A. I was working for the hospital.

Q. And who run that at that time; who was in

(Testimony of Fred Ross.)

charge of it? A. Miss Jean Aubrey.

Q. And who paid you for your work?

A. The Missionary District of Alaska.

Q. Who?

A. The Missionary District of Alaska.

Q. And was that where—was Mr. Lambert in charge there at that time of your work?

A. Yes. [12]

Q. And what did you do for him?

A. Oh, just do a little maintenance work.

Q. What?

A. Do a little maintenance work.

Q. What kind of work?

A. A little maintenance work.

Q. And have you ever been convicted of a crime?

A. Yes.

Q. When were you convicted?

A. Oh, about a couple of years ago.

Q. And did you go to the penitentiary?

A. Yes.

Q. What did you go for?

A. One year and a day.

Mr. Stevens: Your Honor, that is as far as he can go. I object to any further questioning. Mr. Hurley asked his question and he has his answer.

Q. (By Mr. Hurley): Were you in Fort Yukon at the time you were convicted? A. No.

Q. Whereabouts? A. Here.

Q. And were you working here? A. No.

Q. What were you doing? [13]

A. Looking for a job.

(Testimony of Fred Ross.)

Q. Didn't you have a job? A. No.

Mr. Stevens: I object to this. It is immaterial, incompetent and irrelevant and not connected with cross-examination.

The Court: Put your objections in promptly and I will rule on it.

Q. (By Mr. Hurley): Now, you say that Mr. Lambert asked you to go and buy this?

A. Yes.

Q. This liquor? A. Yes.

Q. And did he tell you why he wanted you to buy it? A. Yes.

Q. What did he say?

A. He said he wants to stop this thing.

Q. Stop what thing?

A. From Gilbert Lord selling this whiskey.

Q. How did he know that Mr. Lord was selling whiskey? A. I don't know.

Q. What? A. I don't know.

Q. Did you know of him having anybody else buy liquor? A. Pardon? [14]

Q. Do you know of him trying to get anybody else to buy liquor? A. No.

Q. He just picked you out? A. Yes.

Q. What did he tell you when he told you to go and buy this liquor; did he tell you that you had to go and buy it? A. No.

Q. What did he tell you?

A. He just wanted me to help him out.

Q. Help him out, and did he say anything about you having to testify against Gilbert Lord in this

(Testimony of Fred Ross.)

case? A. I don't quite understand that, sir.

Q. I say, did he tell you that you would have to testify against Gilbert Lord in this case?

A. Yes.

Q. And did he tell you what his reason was for telling you that you had to testify? A. Yes.

Q. What did he say?

A. He said he wants to stop Gilbert Lord from selling whiskey and doing evil things.

Q. And did he say anything about your job?

A. No.

Q. Didn't say a word about it?

A. No. [15]

Q. Didn't tell you that you had to go and claim that you was buying this whiskey in order to hold your job? A. No.

Q. You sure of that? A. Yes.

Q. Didn't you tell somebody else that you had to go and buy this liquor in order to hold your job?

A. No.

Q. You didn't tell anybody? A. No.

Q. You sure of that? A. I am sure.

Q. You sure you just bought four bottles of whiskey and paid how much for them, did you say?

A. Six dollars a piece.

Q. Six dollars a bottle. Do you know about how much they sell it for when they bring it in on the airplanes? A. No.

Q. Fort Yukon? A. Pardon?

Q. Do you know how much they sell it for when

(Testimony of Fred Ross.)

they bring it in on the planes over to Fort Yukon from Fairbanks? A. No.

Q. Didn't you ever buy any?

A. I just bought these four here.

Q. Never bought any from anybody else? [16]

A. No.

Q. How did you get your liquor?

A. I generally sent for it.

Q. To whom did you send? A. Lindy's.

Q. Lindy's Grocery? A. Yes.

Q. And how much did you pay for it?

A. Oh, it wasn't too much.

Q. About how much a bottle?

A. Well, about \$1.75.

Q. What size bottle? A. Half pints.

Q. Half pints, bought them for \$1.75, that right?

A. Yes.

Q. Do they bring much of it over there by plane?

A. Yes.

Q. Anybody can buy it over there that wants to, is that right? A. I don't know.

Q. You know people buying it over there, don't you? A. No.

Q. Never knew anybody else to buy any but you?

A. Yes.

Q. You know of anybody else selling it?

A. No. [17]

Q. Only man you ever knew of selling liquor was Gilbert Lord; is that right? A. Yes.

Q. And Mr. Lambert told you that he was selling it, is that right? A. No.

(Testimony of Fred Ross.)

Q. He didn't tell you that Gilbert Lord was selling whiskey? A. Oh, yes.

Q. And did he tell you how he knew?

A. No.

Q. You didn't know that Gilbert Lord sold whiskey, did you? A. No.

Mr. Hurley: I think that's all.

Redirect Examination

By Mr. Stevens:

Q. Fred, you just put your initials on here, is that your testimony, on each one of these exhibits?

A. Yes.

Q. "F.R." on each one; those are your initials and you wrote them? A. Yes.

Q. You didn't write the date? A. No.

Q. And you say that you did taste one of the bottles? [18] A. Yes.

Q. Have you ever tasted whiskey before?

A. Off and on, I did.

Q. And was that whiskey in that bottle?

A. Yes.

Q. Fred, at the time you bought this whiskey, did you see Mr. Lord have a license on the wall to sell liquor? A. No.

Q. Fred, where, exactly, is Mr. Lord's house in Fort Yukon?

A. It is about in the center of town.

Q. And did you know that house before you went there on the night of the 18th of February?

A. Yes.

(Testimony of Fred Ross.)

Mr. Stevens: That's all.

The Court: I think we had better have a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:08 a.m. the court took a recess until 11:18 a.m., at which time it reconvened.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Stevens: Yes, your Honor.

Mr. Hurley: Yes, your Honor.

FRED ROSS

the witness on the stand at the time the recess was taken, resumed the stand for [19]

Recross-Examination

By Mr. Hurley:

Q. Did you quit work up there in Fort Yukon?

A. Yes.

Q. How did you happen to quit?

A. Oh, I just wanted to get out for awhile.

Q. Didn't they fire you up there because you were drinking so much?

A. I was going to quit so I——

Q. What? A. I don't know.

Q. Didn't you get fired because you got drunk so much? A. No.

Q. You sure of that?

(Testimony of Fred Ross.)

A. I don't think so. They never mentioned anything like that to me.

Q. When was it that you quit?

A. It was last month.

Q. When? A. Last month.

Q. And were you drinking then?

A. I drank that night a little bit.

Q. What night?

A. The night before I quit.

Q. Where did you get your whiskey?

A. I sent for it. [20]

Q. Whereabouts? A. Lindy's.

Q. What? A. Lindy's.

Q. How much did you get?

A. I bought a case of wine.

Q. What else? A. That's all.

Q. Who brought it over for you?

A. Cliff Fairchild.

Q. What? A. Cliff Fairchild.

Q. Who did you come over here with from Fort Yukon? A. Pardon?

Q. Who did you come over here with from Fort Yukon? A. Mr. Lambert and Silas John.

Q. Whose plane was it?

A. Cliff Fairchild.

Q. Did you take any wine back with you in the plane when you came over here from Fort Yukon?

A. No, I just took a few bottles over.

Q. Who got that for you?

A. I bought it myself.

Q. And who was flying the plane when you took

(Testimony of Fred Ross.)

it back? A. Cliff Fairchild.

Q. And who was in the plane?

A. Silas John. [21]

Q. Who else? A. And Mr. Lambert.

Mr. Hurley: That's all.

Mr. Stevens: No further questions. Thank you very much, Fred.

(Witness excused.)

Mr. Stevens: Silas John, please.

SILAS JOHN

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you tell us your name, please; what is your name? A. Silas John.

The Clerk: Government's Identification No. 5, No. 6 and No. 7.

(Two bottles of wine were marked Government's Identification Nos. 5 and 6, respectively; and one bottle of home brew was marked Government's Identification No. 7.)

Q. (By Mr. Stevens): And where do you live, Silas?

A. I stay in Fort Yukon and I work at the hospital 1939.

Q. Do you know Gilbert Lord?

(Testimony of Silas John.)

A. Yes, I know him. [22]

Q. That is the gentleman sitting at the table there? A. Yeah, I know.

Q. And do you know where he lives?

A. Fort Yukon, right in the center of town.

Q. This is our Identification No. 5, Silas?

A. Yes.

Q. Have you seen that before?

A. This wine?

Q. That bottle? A. Yes.

Q. Where did you see that?

A. I got it from Gilbert, you know.

Q. And how much did you pay him for it?

A. Five dollars cash.

Q. And when was that? A. February.

Q. Can you talk a little louder, Silas?

A. February 19th.

Q. It was the 19th of February of this year?

A. Yes.

Q. 1954? A. 19—this year, February, '54.

Q. Where were you when you bought that?

A. I had been at the Marshal's place. They give me money.

Q. You were at the Marshal's place? [23]

A. Me and Ellis, we go over there to Marshal's place, and Marshals give me money and I went, Lambert, too, and Mr. Elliott and me, we go over to Marshal, Fort Yukon Marshal.

Q. Yes, you went to the Marshal's house with Mr. Elliott?

A. Yes, and Marshal searched me, you know, my

(Testimony of Silas John.)

pocket and everything. Next he give me money. I went over to Gilbert Lord. I bought one wine in February 19, nine o'clock.

Q. Now, it was about nine o'clock?

A. Yeah.

Q. Was the wine in that bottle when you bought it?

A. Yes, that time it was empty. He took a big jug of wine and filled it up and he gave me, I give him five dollars and I went to the Marshal's place.

Q. You paid him five dollars for the bottle and then you took it back to the Marshal's place?

A. Yes.

Q. And now this is our Identification No. 6, Silas?

A. Yes.

Q. Did you see that?

A. Yeah.

Q. Where have you seen that before?

A. Same place.

Q. When was that?

A. February 20.

Q. What time was it? [24]

A. About twelve o'clock.

Q. In the morning?

A. Make night, about twelve o'clock.

Q. You mean it was just a little after midnight on the morning of the 20th?

A. Yes.

Q. And was that February?

A. Yeah, February.

Q. Of this year, 1954?

A. Yes.

Q. And how did you get that from Mr. Lord?

A. Put it—he got big jug of wine, you know.

(Testimony of Silas John.)

He poured it in for me and I give him five dollars cash.

Q. Did you see him pour it out of a big jug?

A. Yes.

Q. And you paid him five dollars?

A. Yes.

Q. All right, did you taste any of the wine you bought? A. Yes.

Q. Have you had wine before?

A. Yeah, a lot of times.

Q. And you know what it tastes like?

A. Yes.

Q. And is this wine? A. It is wine. [25]

Q. And did you buy anything else that night?

A. Before that I buy it all the time.

Q. Now, this is our Identification No. 7; did you see that before?

A. Yeah, I see it a lot of time.

Q. And where did you get that?

A. This one, this is home brew.

Q. Where did you get that?

A. Gilbert Lord.

Q. And when did you buy it?

A. February 20, twelve o'clock.

Q. At the same time you bought this last one?

A. Yes.

Q. This one here, that is our Identification 6 that you just——

A. Yeah, all together I bought six dollars.

Q. How much did you pay for that?

A. One dollar.

(Testimony of Silas John.)

Q. And you paid him five dollars for the wine so you paid him altogether six dollars the second time?

A. Yes. The first time I buy one quart wine, and the last time wine and this.

Q. The first time you bought a quart of wine and the second time you bought a quart of wine and home brew?

A. Yes.

Q. Is that home brew? [26]

A. Sure, it's home brew.

Q. How did you know he had that for sale?

A. Well, I be over there all the time. He sell home brew all the time.

Q. You knew he sold it?

A. Yeah, I know that.

Q. Do you know whether he has a license? Does he have a license to sell this?

A. I don't know nothing about it. He ain't got no license, I think.

Q. You don't think he does?

A. I never saw a license on the wall.

Q. Did you see any more liquor in his place when you got this?

A. Yes, I see he got home brew. I don't see liquor, just the home brew and wine. That's all I see.

Q. And he had this wine in a big jug when you went in?

A. Yeah. Me, I don't see nothing, pretty hard for me.

Mr. Stevens: Your witness, Mr. Hurley.

(Testimony of Silas John.)

Cross-Examination

By Mr. Hurley:

Q. Did you see any more home brewed beer there? A. Where?

Q. Where you say you got that bottle?

A. Well, it is home brew, this one.

Q. What? [27] A. This one is home brew.

Q. Did you see any more? A. Where?

Q. Did you see any more, any more home brewed beer? A. This one, that's all I know.

Q. Is that the only one you saw? A. Yeah.

Q. There wasn't any more there?

A. Just the one quart.

Q. One bottle? A. Yeah.

Q. How much wine did you see?

A. That's all I saw.

Q. Right here. Where was this home brewed beer? A. Gilbert, Gilbert Lord.

Q. What? A. Gilbert Lord.

Q. I know, but whereabouts?

A. In his house, Fort Yukon.

Q. What? A. Fort Yukon.

Q. Was it in his house? A. Yes.

Q. Whereabouts in his house?

A. Just about where he stayed, you know.

Q. What? [28] A. Just a room.

Q. Whose room? A. Gilbert.

Q. Who else stayed in that room?

A. He stayed himself.

Q. Was there anybody with you when you saw this beer and wine?

(Testimony of Silas John.)

A. I see that woman there, too.

Q. Saw what?

A. Woman, one woman there all the time.

Q. What was she doing there?

A. I don't know.

Q. Wasn't she taking care of his children?

A. I don't know.

Q. You didn't see any children?

A. I see children, but I do not.

Q. You knew that Gilbert Lord has children there, didn't you; you know his family, Gilbert's family?

A. Yes.

Q. And they were there, were they?

A. Yeah, I never see his wife.

Q. Who went with you when you got this wine and beer?

A. Just me alone.

Q. Who sent you?

A. I went to a Marshal's place.

Q. What? [29]

A. I went to Marshal's place.

Q. Marshal send you over there?

A. I went to Marshal's place. He gave me money. I get it.

Q. How much money did he give you?

A. He gave me last time he give me six dollars.

Q. Is that all?

A. He give me five dollars, six dollars. He give me eight dollars the first time.

Q. How much?

A. Yes.

Q. Altogether eight dollars?

(Testimony of Silas John.)

A. And I buy one quart of wine and I give him five dollars.

Q. And what did you do with the wine?

A. The rest of it I gave it back to him.

Q. You took it back to the Marshal?

A. Yeah.

Q. What did he do with it?

A. I just give him the wine. That's all I know, and the rest of the money I give back to him.

Q. What did you do with the beer?

A. I mean just the first time I buy a quart of wine, and the last time I buy one quart wine and one quart beer.

Q. Did you drink any of it?

A. Yes. I drank some of that wine. [30]

Q. Did you drink any beer?

A. Yes, a glass of beer.

Q. And where did you get the beer?

A. His place.

Q. Out of that bottle, did he take the beer out of the bottle?

A. Yeah, in a glass he give me a shot of beer.

Q. What bottle did he take it out of?

A. Quart bottle. He got quart bottle, you know.

Q. Just like the one that is there, same kind of bottle?

A. Not the same kind, no. Different kind bottle.

Q. Not the same bottle? A. No.

Q. He had a different bottle?

A. No, he got different bottles home brew.

Q. Did you ever see him make any beer?

(Testimony of Silas John.)

A. I see. I drink all the time beer over there, but I didn't never see him make it.

Q. You see it over there?

A. Yeah, every night I have been there.

Q. You used to go there every night?

A. Yes.

Q. Did you drink there every night?

A. I drink just a little, not much, you know.

Q. Not much? [31] A. No.

Q. Where do you work?

A. I work in the hospital since 1939.

Q. Who do you work for?

A. I work in the Fort Yukon Hospital.

Q. Who do you work for?

A. Bishop Gordon, and I forgot that woman, her husband, he working.

Q. What do you do? A. Oh, just janitor.

Q. What? A. Janitor.

Q. Who told you to—that they wanted you to buy liquor and wine and beer?

A. I just went to the Marshal's place. He give me money. That's all. I just buy some.

Q. Who gave the Marshal the money, do you know? A. Marshal is name Wilson.

Q. Who gave him the money, do you know?

A. Marshal over there, you see, he give me money, Wilson.

Q. Do you know where he got the money?

A. He give me the money and that's why I buy the liquor.

Q. Did he tell you not to drink it?

(Testimony of Silas John.)

A. I don't know. He just keep it. I give it to him. That's all. [32]

Mr. Hurley: That's all.

Mr. Stevens: Thank you very much, Silas.

(Witness excused.)

Mr. Stevens: Mr. Lambert, please.

RICHARD LAMBERT

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Richard Lambert.

Q. Where do you live, Mr. Lambert?

A. Fort Yukon.

Q. Do you know Fred Ross? A. Yes, sir.

Q. Do you know Silas John? A. Yes, sir.

Q. And do you know Gilbert Lord?

A. Yes, sir.

Q. On the night of the 18th of February, did you see Fred Ross? A. Yes, sir.

Q. Where did you first see him that night?

A. In his home.

Q. And did you go anywhere with him?

A. Yes, sir. [33]

Q. Where did you go with him?

A. To Marshal Wilson's home, and from there I watched him go into Mr. Lord's home.

(Testimony of Richard Lambert.)

Q. Now, prior to the time that he went into Mr. Lord's home, did you do anything in regard to—all right, strike that. What did you do when he went into Mr. Lord's house?

A. Before he went in we searched Mr. Ross and gave him some money.

Q. How much money did you give him?

A. I gave him ten dollars. Mr. Wilson gave him twenty-five, and he left with thirty-five dollars, and we watched him, went out to the house with him. Went out of the Marshal's house with him, followed along perhaps seventy-five yards, watched him go into Mr. Lord's house and waited a few minutes until he came back out and walked with him back to the Marshal's house where we searched him, found what money he had and found that he had two half pints of whiskey.

Q. What type of whiskey was it?

A. It was Imperial whiskey.

Q. And Government's Identification 1 and 2, are these the pints of whiskey that you took from him?

A. Yes, sir.

Q. And at that time how much money did he have?

A. Twenty-three dollars, and we found the whiskey with him.

Q. Now, did you see him again that evening?

A. Yes, sir. [34]

Q. When was that?

A. Stayed with him until about 1:00 a.m. on the morning of the 19th, searched him again and again

(Testimony of Richard Lambert.)

walked with him until he went up into Mr. Lord's home, and again returned with two bottles of whiskey.

Q. And Government's Identification 3 and 4, are these the second pair of bottles of whiskey that you took from him? A. Yes, sir.

Q. Do you know how much money he had when he went into the house the second time? .

A. I'm not sure.

Q. Did you search him when he returned the second time? A. Yes, sir.

Q. Do you remember the difference in the amount of money that he had when he went in and the amount of money he had when he came out?

A. Twelve dollars again was the missing amount. I believe he came back with eleven dollars.

Mr. Stevens: Your witness, Mr. Hurley.

Cross-Examination

By Mr. Hurley:

Q. Where did he carry this whiskey?

A. Inside his jacket, sir.

Q. What?

A. Inside a jacket, or perhaps in his pocket. I believe it was inside his jacket, yes, sir. [35]

Q. And when did you first see the whiskey?

A. In the living room of Mr. Wilson's house.

Q. And who was present?

A. Fred Ross, Mr. Wilson and Mrs. Wilson.

Q. And what was done with the whiskey then?

A. I put my name on the bottles. I believe Mr.

(Testimony of Richard Lambert.)

Wilson did, too, and Mrs. Wilson and Fred, or initials.

Q. And what did you do with them?

A. Well, I didn't touch them. I believe Mrs. Wilson put a label on the bottles.

Q. And then what became of the bottles?

A. I don't know, sir.

Q. Where did he take them?

A. They were in Mr. Wilson's home.

Q. All the time?

A. All of what time, sir?

Q. The time they got there? A. Yes, sir.

Q. And then what became of them?

A. I don't know, sir.

Q. You don't know what happened to them?

A. I presumed Mr. Wilson kept them in his care, yes.

Q. But you don't know; you didn't see them any more?

A. Not until—no, I didn't see them any more.

Q. And did you drink any of this whiskey?

A. No, sir. [36]

Q. He didn't drink any of it, the bottles weren't open? A. I didn't see him drink any.

Q. Were the bottles open?

A. The whiskey bottles were sealed, sir.

Q. What?

A. The whiskey bottles were sealed when he brought them back.

Q. They were never opened as far as you know?

A. Perhaps he opened one.

(Testimony of Richard Lambert.)

Q. Perhaps he did, whereabouts?

A. I would like to strike that out. I would say he didn't open one of those bottles.

Q. He didn't open any of the bottles?

A. Not to my knowledge.

Q. Then you don't know what is in the bottles yourself? A. No, sir.

Q. All you know is what you have been told?

A. I know there was a seal, a stamp on the bottles and the type of label on it. That's all, sir.

Q. That's all you know about it. You don't know whether they contained whiskey or not, or whether anybody ever drank any of it?

A. Not of those particular bottles.

Q. Were there any other bottles involved?

A. No, sir. [37]

Q. That's the only ones that you know anything about?

A. Yes. I presume that whiskey was in them.

Q. You are just guessing at that?

A. It is a little better than a guess, sir.

Q. Did you smell any of them?

A. They weren't open.

Q. So, he had these in his jacket, took them into Wilson's house, and left them there as far as you know? A. Yes, sir.

Q. And when did he return to his house?

A. Fred Ross, probably two or three o'clock in the morning.

Q. Were you with him? A. Yes, sir.

Q. Where did he have the money then?

(Testimony of Richard Lambert.)

A. He had no money then.

Q. He had no money. I thought you said you searched him and counted the money he had on him when he went home?

A. When he went home the money had been Mr. Wilson's and mine, and it stayed in Wilson's possession, so when he went home he had no money.

Q. Oh, Wilson got the money? A. Yes, sir.

Q. How much of that was your money?

A. Ten dollars, sir.

Q. Did you ever get that back? [38]

A. No, sir.

Q. He's still got that, too, Wilson has?

A. Well, it might be the ten dollars was spent on the whiskey, sir.

Q. How's that?

A. The ten dollars might have been spent on the whiskey.

Q. Ten?

A. Part of it might have been, yes, sir.

Q. And you don't know what became of the rest of it? A. No, sir.

Q. When he got back to his cabin he didn't have any money at all? A. That's right, sir.

Q. Where did you and Wilson search him?

A. In Mr. Wilson's home, sir.

Q. And how much did he have when you searched him?

A. The first time, thirty-five dollars, before he bought two bottles. When he returned he had

(Testimony of Richard Lambert.)

twenty-three dollars. When he returned the second time he had eleven dollars.

Q. And the searching was all done in Wilson's house? A. Yes, sir.

Q. And how long was it from the time he left Wilson's house before you came back to Lord's house? A. Perhaps ten minutes, sir.

Q. Ten minutes? A. Yes, sir. [39]

Q. Now, what was the time that you first went into Lord's place, when was that?

A. About 9:30 p.m., February 18th.

Q. 9:30 p.m.? A. Approximately.

Q. February 18th? A. Yes, sir.

Q. And that was on the 18th day of February, was it? A. Yes, sir.

Q. And where did he go then, after he went there at 9:30?

A. Back to Mr. Wilson's home, sir.

Q. And how long did he stay there?

A. Till about one o'clock.

Q. The next morning?

A. No, sir, we left Mr. Wilson's house perhaps a half an hour later and went to the Commissioner's home.

Q. You left there about ten o'clock?

A. Yes, sir.

Q. And went to the Commissioner's house?

A. Yes, sir.

Q. What were you doing over there?

A. Commissioner's?

Q. Yes.

(Testimony of Richard Lambert.)

A. A record of what had transpired was typed out by the Commissioner. [40]

Q. Transpired where?

A. At Mr. Wilson's house and at Mr. Lord's house.

Q. Who typed it out?

A. The Commissioner, Mr. Beaver.

Q. And what was the purpose of typing that out?

A. Just to get what had taken place, what had transpired on these papers.

Q. And he typed there from half past nine until midnight?

A. No, sir. He typed perhaps fifteen or twenty minutes.

Q. And then where did you go?

A. Back to Mr. Wilson's house.

Q. Was Silas with you then? A. No, sir.

Q. Where did he go?

A. Where did Silas go? Well, he wasn't—this is still, as I understand it, we are talking about the evening of February 18th, and Mr. Silas John wasn't there the evening of the 18th.

Q. Oh, Ross, it was Fred?

A. Yes, this was Mr. Ross.

Q. Yeah, well, where did he go?

A. He went back from the Commissioner's house back to Mr. Wilson's house.

Q. How long did he stay at the Commissioner's house?

A. We stayed there about a half an hour. [41]

(Testimony of Richard Lambert.)

Q. What was he doing there, Fred?

A. He was with Mr. Wilson and myself.

Q. Oh, Mr. Wilson went over to the Commissioner's house with you?

A. Yes, sir.

Q. Did you search him over there?

A. At the Commissioner's house, no, sir.

Q. And did you have any liquor over there?

A. Did Mr. Ross have any liquor there?

Q. Yes, anybody?

A. Mr. Ross had none. I didn't either.

Q. Well, they didn't take any liquor over there then, to the Commissioner's house?

A. They didn't show me. They didn't show the liquor to me if they did bring it over.

Q. Well, if there had been some over there you would have seen it?

A. I had seen it once before in the evening. I wasn't too particularly concerned to find out who it was or who was carrying it, if they had it with him.

Q. Who would have had it over at the Commissioner's if there had been any there?

A. Perhaps the Marshal.

Q. And you don't know whether the Marshal took any over there or not?

A. No, sir. [42]

Q. And you say you and the Marshal and Fred Ross were there about a half an hour?

A. Yes, sir.

Q. And then where did you go?

A. Back to Mr. Wilson's house.

Q. Then you were only gone about a half an hour

(Testimony of Richard Lambert.)

altogether from Wilson's house, between 9:30 and one; is that right? A. No, sir.

Q. How long were you gone?

A. First we went to Mr. Lord's house. Then we came back to Mr. Wilson's house. We stayed there perhaps a half an hour. Then we went to Mr. Beaver's house, the Commissioner's, and stayed there about a half an hour. We went back to Mr. Wilson's house, stayed there until about 1:30 a.m., February 19th.

Q. Then where did you go?

A. Back to Mr. Lord's house.

Q. Did you go in? A. No, sir.

Q. Why not?

A. I watched Mr. Ross go in, sir.

Q. Why didn't you go in?

A. I had given him my money. I wasn't particularly interested in buying whiskey.

Q. You did go in there the next day or two? [43]

A. No, sir.

Q. Didn't you go in there and serve a search warrant on the 25th of February?

A. That was about a week later, sir.

Q. On the 25th, wasn't it? A. Yes, sir.

Q. On the 25th of February? A. Yes, sir.

Q. That was a few days later? A. A week.

Q. Where did you search?

A. Searched Mr. Lord's house, sir.

Q. Who was with you on that search?

Mr. Stevens: I object, your Honor. This is ir-

(Testimony of Richard Lambert.)

relevant to the issues before the court, a search that took place almost a week later.

The Court: Objection sustained.

Q. Was Mr. Lord there when you searched the place?

Mr. Stevens: I object again, your Honor.

The Court: Objection sustained.

Q. (By Mr. Hurley): Did you go back to Lord's place with Fred Ross or Silas John after the 18th?

A. Yes, sir.

Q. When was that? A. The 19th. [44]

Q. And did you ever go back after that?

A. Yes.

Q. When? A. Past it. I was outside.

Q. Just past the house?

A. Not back there, because I hadn't gone into his house at all, sir.

Q. You just went past? A. Yes.

Mr. Hurley: That's all.

Redirect Examination

By Mr. Stevens:

Q. Did you go back, you say, with Silas John the next day? Mr. Hurley just asked you if you were with Silas John. A. On the 20th?

Q. Yes.

A. Yes, I was with Silas in Mr. Wilson's home.

Q. And did you go through the same procedure with Silas that you had gone through with Fred Ross?

(Testimony of Richard Lambert.)

A. No, I didn't, as I say, I didn't go back. I went outside and watched them, but Mr. Elliott, Mr. Wilson and Mr. John left.

Q. This is Government's Exhibit 7; have you seen this before? A. Yes, sir.

Q. Is there any way that you can identify that bottle? [45] A. Well, I——

Q. Are those your initials on there?

A. No, sir.

Q. They are not? A. No, sir.

Mr. Stevens: That's all. Mr. Hurley, have you anything further?

Mr. Hurley: No.

(Witness excused.)

Mr. Stevens: May we take the recess, your Honor?

The Court: The Court in a moment will adjourn until 1:30, but the jury will be excused until two o'clock. Return here at two o'clock.

The Clerk: Court is recessed until 1:30.

(Thereupon, at 12:00 noon, a recess was taken until 1:30 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Stevens: Yes, your Honor.

Mr. Hurley: Yes, your Honor.

The Court: Very well. Proceed.

Mr. Stevens: Call Mr. Elliott, please. [46]

NORMAN ELLIOTT

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Norman Elliott.

Q. Where do you reside, Mr. Elliott?

A. Eagle, Alaska.

Q. And where is that from Fairbanks?

A. Two hundred miles due east on the Yukon.

Q. And where is that from Fort Yukon, if you please?

A. Two hundred miles southeast on the Yukon River.

Q. Did you have occasion to be in Fort Yukon on the 19th of February? A. Yes, I did.

Q. Of this year? A. Yes, I did.

Q. And do you know Silas John? A. I do.

Q. Did you see Silas John on that day at any time? A. Yes, I did.

Q. And where did you see him?

A. I saw him working at the hospital and that evening I saw him at the Marshal's house. I saw him go to Gilbert Lord's house, enter, leave, return to the Marshal's house [47] and then to the Commissioner's and then back to his cabin.

(Testimony of Norman Elliott.)

Q. What, if anything, did you do concerning Silas John at the time he went to Gilbert Lord's house?

A. I accompanied him to the Marshal's house and with the Marshal searched him, found out he had no money. He was then given \$15.00 and I watched him go into the roadhouse. I watched him come out.

The Court: What do you mean by the roadhouse?

The Witness: The building which Gilbert Lord lives, sir, is known as the roadhouse, Fort Yukon. I watched him come out and then went with him to the Marshal's and upon his return to the Marshal's again he was searched, was found to have ten dollars and one one-fifth of wine. From there we went to the Commissioner's.

Q. (By Mr. Stevens): This is Government's Identification 5; would you tell us what that is?

A. This is a bottle of wine, appears to be the same bottle which Silas brought back with him at that time from Gilbert Lord's house to the Marshal's.

Q. And do you know to your knowledge did anyone take a drink out of that bottle?

A. Silas, in the presence of the Marshal and myself.

Q. Did what?

A. Took a drink from this bottle.

Q. And did you do anything concerning Silas John again that same evening or the next [48] morning?

(Testimony of Norman Elliott.)

A. Ten minutes past midnight, which would be the next morning, yes. Again he was searched at the Marshal's house in the presence of the Marshal and Mrs. Wilson, the Marshal's wife, and myself. He was found to have no money and was given nine dollars and at that time I went ahead of him to Gilbert Lord's and did not see him enter, but did see him leave, and he—I accompanied him again back to the Marshal's and upon being searched then he was found to have one bottle of wine, one bottle of home brew and three dollars. I again went with him directly, or later, to the Commissioner's. It was about one o'clock when we went to the Commissioner's at that time.

Q. And these items, Government's Identification 6 and 7, will you tell us what they are, please?

A. Yes, this is a bottle of wine and a bottle of home brew which Silas brought back with him on that second visit on the morning of the 20th.

Q. And you witnessed him leave Gilbert Lord's house on this occasion? A. Yes, I did.

Q. And you had searched him prior to the time he went to the house? A. Yes, sir.

Q. And when he came back, that's when you searched him; did you search him when he came back? A. Yes, sir. [49]

Q. How much money did he have left when he came back? A. I—he had three dollars, sir.

Q. And you stated that he had nine dollars when he left? A. Yes, sir.

Mr. Stevens: Your witness, Mr. Hurley.

(Testimony of Norman Elliott.)

Cross-Examination

By Mr. Hurley:

Q. What was this money? What did it consist of? What kind of money?

A. I believe the first, sir, was a ten dollar bill and a five dollar bill. The second time was a five dollar bill and four silver dollars.

Q. You gave him fifteen dollars first?

A. I didn't sir; the Marshal did.

Q. Gave him fifteen dollars? A. Yes, sir.

Q. And then the next time you gave him how much? A. Nine dollars, sir.

Q. Nine, that made twenty-four dollars altogether that the Marshal gave him?

A. Yes, sir.

Q. And what did he do with that money?

A. That was returned again to the Marshal, sir, at the end of each visit, the change.

Q. The change? [50] A. Yes, sir.

Q. Now, the Marshal searched him every time, did he? A. Yes, sir.

Q. And did you sit in on that search?

A. Yes, sir.

Q. And what was the reason for searching him, didn't you trust him?

A. Yes, sir, but we wished to establish evidence.

Q. And did he work for you?

A. No, sir, not at that time.

Q. Had he worked for you?

A. Indirectly, sir. I was priest in charge of St.

(Testimony of Norman Elliott.)

Stephen's Mission at Fort Yukon for one year, from September of 1952 to September of '53.

Q. How long did you preach up there?

A. One year, sir, at Fort Yukon, and at that time he was under my care when I was acting as a priest because the hospital is more or less under the supervision and jurisdiction of the priest of the Mission, it being an Episcopal Hospital.

Q. And which bottle did he drink out of?

A. Which one, sir? The first one that he brought back.

Q. Why did he drink out of that?

A. Upon, just prior to his second visit, sir.

Q. Prior to his second visit?

A. Yes, sir, to Gilbert Lord's. [51]

Q. But I say, why did he drink out of that bottle?

A. It was felt that he should have liquor on his breath when he made the second purchase.

Q. And who was that going to influence, the fact that he had liquor on his breath?

A. We felt that he might then again obtain another purchase.

Q. By having liquor on his breath?

A. Yes, sir.

Q. I see, and was this liquor wine or beer?

A. It was wine, sir.

Q. And why did you pick the wine instead of the beer?

A. Because he had no beer with him on that first visit. He brought back only wine.

(Testimony of Norman Elliott.)

Q. Did anybody else drink? A. No, sir.

Q. Anybody else go over there with him?

A. The Marshal, sir.

Q. Went to the roadhouse with him?

A. Watched him enter, sir. Neither one of us went side by side with him, but we kept him in view as he went ahead of us.

Q. And how far was he from you?

A. Not more than thirty-five feet at any time, sir, except when he went into the house, and at that time I was not more than twenty-five feet away from the back stairs. [52]

Q. And you know where he went after he went inside? A. No, sir, I do not.

Q. And where did he go after he came out?

A. Directly to the Marshal's, sir.

Q. And then where?

A. To the Commissioner's.

Q. And what did you do at the Commissioner's office?

A. The Commissioner typed up the statements of Silas and myself and the Marshal.

Q. Made a statement? A. Yes, sir.

Q. Have you got a copy of that statement?

A. I do not, sir. The Marshal, I believe, filed that with the Marshal's office.

Q. The Marshal has it? A. Yes, sir.

Q. And what was done with that statement after the Marshal got a copy of it, do you know?

A. I believe he retained it in his possession until he turned it in here.

(Testimony of Norman Elliott.)

Q. What became of the wine?

A. That was retained in the Marshal's possession.

Q. What became of the money that was paid back?

A. That was also returned to the Marshal and retained by him.

Q. All of the twenty-four dollars? [53]

A. No, sir; the change.

Q. What?

A. No, sir; just the change which he had after the purchase.

Q. Was that all the Marshal's money that was given to him?

A. Yes, sir; none of it was mine.

Q. None of it was your money? A. No, sir.

Q. And you say nobody else sampled this wine and beer? A. Not to my knowledge, sir.

Q. Did the Commissioner make any test or examination of it? A. Not in my presence, sir.

Q. Was it taken over there to him?

A. It was taken to his office, yes, sir.

Q. And he didn't do anything with it at all?

A. No, sir; not in the matter of tasting it, no.

Q. Did anybody else taste it that you know of?

A. No, sir.

Mr. Hurley: That's all.

Mr. Stevens: Thank you very much.

(Witness excused.)

Mr. Stevens: Mr. Wilson.

HERBERT H. WILSON

a witness called in behalf of the plaintiff, was duly sworn and testified as follows: [54]

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Herbert H. Wilson.

Q. What is your occupation, Mr. Wilson?

A. Deputy United States Marshal.

Q. Where are you stationed?

A. Fort Yukon, Alaska.

Q. And were you stationed at Fort Yukon, Alaska, in February of this year? A. I was.

Q. Now, on the 18th of February, did you see a resident of Fort Yukon whose name is Fred Ross?

A. I did.

Q. Where did you see him?

A. He came to my house about, oh, nine o'clock, something like that.

Q. Would you talk a little louder, please?

A. He came to my house about nine o'clock, somewhere along there, him and Mr. Lambert.

Q. And do you know where he went after he left your house? A. I do.

Q. Where did he go?

A. He went to Gilbert Lord's.

Q. And did you watch him go to Gilbert Lord's?

A. I did. [55]

Q. What, if anything, did you do before he entered Mr. Lord's place?

A. Before he left my place I searched him in

(Testimony of Herbert H. Wilson.)

the presence of Mr. Lambert. I went through his pockets. Mr. Lambert just felt the outside of his pockets to see how much money he had, and he didn't have any. I gave him twenty-five dollars and Mr. Lambert gave him ten dollars, and he went up to Gilbert Lord's place. We followed him up to, oh, about thirty feet of the entrance to the place and we hid there and watched him go in the building and he was in there, probably, oh, five, six, seven minutes, something like that.

Q. Would you keep your voice up, please?

A. And he came out of the building and we followed him back down to my place then. We never let him get out of our sight when he was outside of Lord's house. We followed him back down to my place. We went in and we searched him and we found that he had two "mickeys" of Imperial Whiskey and twenty-five dollars left of the thirty-five dollars he started out with.

Q. This is Government's Identification 1; would you tell us what that is, please?

A. That is a half pint of Imperial Whiskey.

Q. And have you seen that before?

A. I have.

Q. Where did you see it?

A. Taken it from Freddy Ross the 18th of [56] February.

Q. Is there any way that you can tell, that you can identify it as being the same bottle?

A. I can.

Q. How is that?

(Testimony of Herbert H. Wilson.)

A. I put the date and the month, date and the year, and my initials on it, and the time.

Q. And where has that bottle been since that time?

A. I kept it in my possession until the 23rd of February, and I brought it over here and it has been in the vault in the Marshal's office ever since until this morning.

Q. And did you get it out of the vault?

A. I did.

Q. This is Government's Identification 2; would you tell us what that is, please?

A. That is another bottle of Imperial whiskey, half pint.

Q. And is there any identification on that?

A. There is.

Q. What is that, please?

A. It has the month and the date and the year and the time that it was bought and my initials and Freddy Ross' initials and Mr. Lambert's initials.

Q. What is the date on there? A. 2-16-54.

Q. And where has that been since the time you first saw it? [57]

A. It was in my possession until the 23rd of February and then it has been in the vault in the Marshal's office ever since.

Q. And did you also get that out this morning?

A. I did.

Q. Now, that bottle has been opened, has it not?

A. Yes.

Q. You know who opened that? A. I did.

(Testimony of Herbert H. Wilson.)

Q. And what did you open it for?

A. I opened this bottle and told Freddy Ross to taste it to be sure that it was whiskey that he was buying, and he tasted it and said it was whiskey all right.

Q. Now, did you see Fred Ross after the occasion you searched him and found these bottles?

A. I did. He stayed there at my house and we went up to the Commissioner's and we came back down to my place. We searched him again between twelve and one. I gave him the twenty-three dollars back that I had taken off him when he came back from the first purchase and he went up and got two more bottles in identically the same fashion as before.

Q. Did you know how much money he had when he left your house the second time?

A. Twenty-three dollars.

Q. And did you search him before he went into the place?

A. Before he left my house, and he never got out of my sight until he went in there. [58]

Q. This is Government's Identification 3; will you tell us what that is, please?

A. It is a half pint of Imperial whiskey.

Q. And where did you first see that?

A. On Fred Ross after he came back out from Gilbert Lord's place.

Q. How can you identify it as being the same bottle?

(Testimony of Herbert H. Wilson.)

A. It has the month and the day and the year, the time and my initials on it.

Q. And this is Government's Identification 4; have you seen that before? A. I have.

Q. Where did you first see it?

A. Taken it from Freddy Ross on the 2nd day of February.

Q. Was that the 2nd day of February?

A. No, February the 19th, 1954, second month, 19th day.

Q. And do you have your initials on that bottle also? A. I do.

Q. Now, the second time when Mr. Ross came back, did you search him after he left Mr. Lord's place? A. I did.

Q. And how much money did he have with him when he returned? A. Eleven dollars. [59]

Q. And you stated he had twenty-three dollars when he left your sight? A. I did.

Q. Now, do you know Silas John? A. I do.

Q. And did you see Silas John on the 19th day of February? A. I did.

Q. Where did you see him?

A. Him and Mr. Elliott came to my house about, something like nine o'clock, between eight-thirty and nine o'clock, right around nine o'clock.

Q. Keep your voice up, please, Mr. Wilson. Did you go through the same procedure with Silas John that you described to the court and the jury in connection with Mr. Ross? A. I did.

Q. What exactly did you do?

(Testimony of Herbert H. Wilson.)

A. I searched him and I gave him fifteen dollars, and then we followed him out there and he went up to Gilbert's and he was in there approximately five minutes, something like that, came out. We followed him back down to my house, went in, searched him. He had a bottle of wine and ten dollars left.

Q. This is Government's Identification 5; will you tell us have you seen that before? [60]

A. I have.

Q. And where did you see that first?

A. Taken that off Silas John after he came back from Gilbert Lord's place.

Q. Is there any identification on that bottle?

A. There is.

Q. And what is that, please?

A. It has the month and the day and the year and my initials and the time.

Q. What was the day and the month?

A. February 19, 1954.

Q. And where has that bottle been since that time?

A. That was in my office, sir, Fort Yukon, until the 23rd of February, and it has been in my vault in the Marshal's office ever since, until this morning.

Q. What did Silas John do after he brought this back?

A. We went up to the Commissioner's and back to my place.

Q. Did you go back again to Mr. Lord's place?

A. We did.

Q. What time was that?

(Testimony of Herbert H. Wilson.)

A. It was shortly after midnight, between twelve and one o'clock.

Q. Did you go through the same procedure you just described?

A. I searched Silas, see that he had no money, and I [61] gave him nine dollars, gave him a five dollar bill and four silver dollars.

Q. And you watched him enter Mr. Lord's place?

A. I did, but I didn't see him leave. He went in the front door and out the back. I was watching the front and the other man was watching the back.

Q. When did you first see him after that?

A. Shortly after I saw them going toward my place.

Q. Will you tell us what this is?

A. That is a bottle of wine.

Q. Where did you see that first?

A. Taken it off Silas John.

Q. Did you take it off of him yourself?

A. Well, he had it sitting right by, on the chair like this holding it in his hand when I went in.

Q. Is there any identification on that bottle?

A. There is.

Q. What is the identification?

A. February 20th, 1954, and my initials.

Q. And where has that bottle been since that time?

A. It was in my possession until the 23rd of February and it has been in the vault in the Marshal's office ever since.

Q. And did you get it out likewise this morning?

(Testimony of Herbert H. Wilson.)

A. I did.

Q. What is that, Government's Identification 7? [62]

A. Bottle of home brew.

Q. Where did you first see that?

A. Got it from Silas John when he came back from Gilbert Lord's place the second time.

Q. Is there any identification on that bottle?

A. There is.

Q. How did that identification get there?

A. Bob Thomas and I put this on here.

Q. And where has that bottle been ever since?

A. It was in my possession until the 23rd of February, and it's been in the vault in the Marshal's office ever since until this morning I take and got it.

Q. You can identify that as being the same bottle that you saw that morning of the 20th?

A. I can.

Q. Of this year? A. I can.

Q. And how much money did Mr. John have when he came back the second time?

A. He had three dollars and a bottle of wine and a bottle of home brew.

Q. And it is your testimony, is it, Mr. Wilson, that these, all of the Government's Exhibits here were in your possession personally until the 23rd of February? A. They were.

Q. Of March that is; is that right? [63]

A. February.

Q. And then you brought them to Fairbanks?

A. Yes.

Q. And you placed them in the vault?

(Testimony of Herbert H. Wilson.)

A. I placed them in the vault myself.

Q. And you got them out of the vault this morning?

A. I taken them out of the vault this morning.

Mr. Stevens: At this time, your Honor, we offer into evidence Government's Exhibits 1 through 7, an individual offer on each one.

The Court: They may be admitted.

The Clerk: Identification 1 is Government's Exhibit "A"; 2 is "B"; 3, "C"; 4, "D"; 5, "E"; 6, "F"; and 7 is "G."

(Government's Identification Nos. 1 through 7, respectively, were received in evidence as Government's Exhibits "A" through "G," respectively.)

Mr. Stevens: Your witness, Mr. Hurley.

Cross-Examination

By Mr. Hurley:

Q. How much money did you say you advanced to these men for buying liquor?

A. I gave Fred Ross twenty-five dollars and Dick Lambert gave him ten dollars.

Q. And whose money was this?

A. Twenty-five dollars of it was mine. [64]

Q. Whose was the other?

A. Mr. Lambert, as far as I know.

Q. What?

A. Mr. Lambert, as far as I know. He had it in his pocket.

(Testimony of Herbert H. Wilson.)

Q. Did he give it to you?

A. He gave it to Freddy, yes.

Q. He gave him ten dollars, you say?

A. Yes.

Q. You gave him twenty-five dollars?

A. That's right.

Q. And are you—do you and Mr. Lambert give money right along to the Indians to buy liquor?

A. In a case like this I will.

Q. You do it right along?

A. In a case like this I will.

Q. And where does the money come from?

A. I make my own money.

Q. This is money that you make to give to the natives to buy liquor?

A. I work for my money and I give it to the natives if I want to.

Q. Does Mr. Lambert dish his money out the same way you do?

A. I couldn't tell you that.

Q. You don't know what the arrangement [65] was?

A. I don't know.

Q. You don't know if it was his money or somebody else's?

A. I don't know.

Q. Did you ever get any of that money back?

A. I don't expect to.

Q. You don't expect to get it back?

A. No.

Q. You say you don't do this very often, do you?

A. Just in cases like this.

(Testimony of Herbert H. Wilson.)

Q. You give the Indians money to buy liquor in cases like this? A. I will, yes.

Q. And how often do you do that?

A. This is the second time that I have done it on Gilbert Lord.

Q. Second time? A. Yes, sir.

Q. And how many times on other people?

A. I never done it on anyone else.

Q. Just after him?

A. Well, he is the only one that is selling over there to amount to anything.

Q. That you know of? A. Yes.

Q. Other people have liquor shipped in there, don't they? [66] A. They do.

Q. Quite a lot of it, isn't there? A. Yes.

Q. In fact, most of it comes in by plane?

A. That's right.

Q. Anybody can order it that wants to?

A. That's right.

Q. A great many people over there do order it and have it come in by plane?

A. That's right.

Q. And they also ship in quantities of pop and malt and things of that kind, do they not, for making beer? A. They do.

Q. And anybody over there can have that. There is nothing wrong with that as far as you know?

A. Not with malt, no.

Q. Now, when you followed this native over to Gilbert Lord's place you say he came in and went out and then came over to your place with the whiskey? A. That's right.

(Testimony of Herbert H. Wilson.)

Q. And then you stayed there for awhile and went some place else?

A. He never was away from me no minute of the time.

Q. Didn't he go some place else after he came to your house?

A. We went to the Commissioner's, yes. [67]

Q. What did you do down there?

A. We were getting ready for a grand jury case.

Q. I think you said he drank some liquor out of one of the bottles?

A. He tasted out of one of them, yes.

Q. So the seals on those bottles, that is at least one of them, has been opened; is that right?

A. One of them.

Q. At least one has been opened?

A. That's right.

Q. And you don't know whether any of the others were opened?

A. No, sir; none of the others were opened.

Q. How do you know?

A. Seals are not broken on them.

Q. But it is broken on one of them?

A. It is broken on one. I broke it.

Q. And you say he just took one drink out of that and that was all?

A. That's right; just the one small drink.

Q. Why didn't he take more?

A. I didn't want him to. I just wanted him to be sure it was whiskey that he was buying.

Q. That was the same way with the wine, was it?

(Testimony of Herbert H. Wilson.)

A. That's right. I wanted him to be sure he was buying wine. I knew he drank enough wine that he could tell. [68]

Q. You thought he had to do that in order for them to know that it was wine and whiskey?

A. Well, it is a good idea, you know, to be certain about things.

Mr. Hurley: I see. That's all.

Redirect Examination

By Mr. Stevens:

Q. Mr. Wilson, the amount of money that you gave to these two people, Mr. Ross and Mr. John, you got the change back except the amount that is represented in the liquor that is in evidence?

A. I did.

Q. Then your funds and Mr. Lambert's funds are still tied up in that?

A. They are still tied up in this batch of stuff, here.

Q. This liquor that is in evidence?

A. That's right.

Q. And when you sent these people to Mr. Lord's house did you know that he would sell liquor to them?

Mr. Hurley: We object to that, calling for a conclusion, incompetent, irrelevant and immaterial.

The Court: Sustain the objection.

Q. (By Mr. Stevens): At any time after these individuals left your house, Mr. Wilson, and went

(Testimony of Herbert H. Wilson.)

to Mr. Lord's and came back to your house, was there any time in that trip to Mr. Lord's and back that they left your sight except when they were in the house of Gilbert Lord? [69]

A. One time Silas John, he went in the front door. I saw him go in the front door and he came out the back door. I was watching the front of the building, and Mr. Elliott was watching the back, and I didn't see him come out, but I saw him as they went down toward my house and the beacon light was there and shone on them and that was the way I saw them.

Q. And what was your purpose in searching these individuals?

A. To make certain that they didn't have anything on them when they went in there, only what I gave them.

Q. And you testified from your own knowledge what they had when they came out?

A. That's right.

Mr. Stevens: Your witness, Mr. Hurley.

Mr. Hurley: That's all.

(Witness excused.)

Mr. Stevens: The Government rests, your Honor. No, no, just a moment. I will withdraw that. I will call Miss Steger. She's in the hall.

OLGA STEGER

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Olga Steger. [70]

Q. And where do you reside, Miss Steger?

A. Fairbanks.

Q. And what is your occupation?

A. Chief Deputy, Clerk of the Court.

Q. And as Chief Deputy, Clerk of this Court, do you have under your supervision or do you have access to the liquor licenses which are issued in this Division? A. Yes.

Q. And do you know the liquor licenses which have been issued in Fort Yukon? A. Yes.

Q. And is there or was there a liquor license issued to Mr. Gilbert Lord in February of 1954?

A. No, sir.

Q. And did he procure for this calendar year a liquor license at any time? A. Not for 1954.

Mr. Stevens: Thank you very much. Your witness.

Mr. Hurley: That's all.

(Witness excused.)

Mr. Stevens: The Government rests, your Honor.

Mr. Hurley: Could we have about a fifteen-minute recess?

The Court: Yes; fifteen-minute recess.

The Clerk: Court is recessed until three [71] o'clock.

(Thereupon, at 2:45 p.m., the court took a recess until 3:00 p.m., at which time the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Stevens: Yes, your Honor.

Mr. Hurley: Yes, your Honor.

The Court: Very well, proceed.

Mr. Hurley: Call Mr. Lord.

GILBERT LORD

the defendant, called as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name? A. Gilbert Lord.

Q. Where do you live, Mr. Lord?

A. Fort Yukon.

Q. How long have you lived there?

A. Off and on for the last thirty years.

Q. Do you have any family there?

A. Part of my family's home and the rest of them, some of them are going to school and some in the Army.

Q. How many children do you have?

A. I have nine.

Q. How many are at Fort Yukon? [72]

A. There is three youngest ones at home.

(Testimony of Gilbert Lord.)

Q. And do you have a home there, or a roadhouse?

A. Not at the present time. It is closed right now.

Q. What?

A. The roadhouse is closed at present.

Q. Do you do any business there at all now?

A. No.

Q. Have you done any there for sometime?

A. Well, I rented it out to several different parties the last two years.

Q. The last two years? A. Yes.

Q. And how long has it been rented here recently?

A. Well, it was rented out last year to a man by the name of—I forgot his name.

Q. You forgot his name, you say?

A. Yeah.

Q. Do you know a man up there by the name of Fred Ross? A. Yes.

Q. Is he a native? A. Yes.

Q. How long have you known him?

A. Oh, I should say from the time he was born practically.

Q. And you know Silas John? A. Yes.

Q. How long have you known Silas? [73]

A. Fifteen or twenty years.

Q. And what have they been doing up there, do you know?

A. Well, Silas John worked around the hospital for quite a number of years.

(Testimony of Gilbert Lord.)

Q. And what has the other native done?

A. Well, as far as I know he has been doing a little trapping and odd jobs, and lately he was working for the hospital.

Q. How long did he work for the hospital?

A. I don't know. I know he was working there last summer sometime, but then he got laid off and got rehired again.

Q. Rehired again, you say?

A. Well, then he got fired again, or quit. I don't know which. I couldn't swear to it just lately.

Q. And did you hear his testimony about his claim of buying some pints of whiskey from you?

A. Well, I heard evidence that he was supposed to have bought it from me, yes.

Q. You heard the testimony? A. Yes.

Q. Did you ever sell him any whiskey?

A. No.

Q. Did you ever sell Silas John any wine or beer? A. No.

Q. Did you ever know of anybody coming in there to your place inquiring for liquor? [74]

A. Yes, that same fellow came up there, that same Fred Ross came up to my place one time.

Q. Fred who? A. Ross.

Q. What happened?

A. Well, he wanted to buy some liquor. I told him I didn't have anything and he got mad and I had to tell him to get out of there.

Q. When was this?

A. I can't remember. It was lately, around about

(Testimony of Gilbert Lord.)

the time that he claims he brought the stuff up there.

Q. Along about the same time? A. Yes.

Q. Do you know how he happened to make that claim that he bought liquor from you; do you know how he happened to make that claim? A. No.

Q. You don't know what caused him to come in and claim that you sold him liquor?

A. No, I don't know how.

Q. Well, did he ever come in there with any money?

A. Not that I know of. That is the only time I remember him up there was the night I had to tell him to get out because the children were all asleep and he was getting loud, speaking loud and waking them up.

Q. Did you ever make any beer or sell any wine there at your place? [75] A. No.

Q. Do you know of people shipping in liquor there?

A. Why, yes, there is a plane comes in every other day.

Q. Does it usually bring liquor? A. Yes.

Q. And have you had liquor shipped in?

A. Yes.

Q. Did you have liquor at your place at different times? A. Yes.

Q. Did you ever have any there for sale?

A. Yes.

Q. For sale? A. No.

Q. Did you ever know of any officers or anybody

(Testimony of Gilbert Lord.)

of that kind giving people money to buy liquor?

A. No.

Q. You never got any marked money yourself?

Mr. Hurley: That's all. You may cross-examine.

Cross-Examination

By Mr. Stevens:

Q. Did Silas John come to your place on the morning of the 20th of February?

A. I couldn't tell you whether it was the 20th or any other day. He is usually up there once or twice a week.

The Clerk: Government's Identification No. 8.

(Judgment and Commitment No. 1676, Criminal, was marked Government's Identification No. 8.)

Q. (By Mr. Stevens): Did you let him out the back door yourself?

A. I don't let nobody out the back door. There is a hallway. They go out themselves.

Q. But you didn't go to the door and let him out? A. No.

Q. And your name is Gilbert Lord?

A. That's right.

Q. Will you tell us, are you the Gilbert Lord that is named in Government's Identification 8?

A. Yes, sir.

Mr. Stevens: Your Honor, we offer Government's Identification 8 in evidence for impeachment purposes.

(Testimony of Gilbert Lord.)

Mr. Hurley: We object to it on the grounds it is incompetent, irrelevant and immaterial, no proper foundation laid for it.

The Court: Overruled. It may be admitted.

The Clerk: Government's Exhibit "H."

(Government's Identification 8 was received in evidence as Government's Exhibit "H.")

Mr. Stevens: May I read this to the jury?

The Court: Surely.

Mr. Stevens: Government's Exhibit "H" (reading): [77]

GOVERNMENT'S EXHIBIT H

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1676 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILBERT LORD,

Defendant.

JUDGMENT AND COMMITMENT

On the 16th day of November, 1953, came the attorney for the Government, and the defendant appeared in person, and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense charged

(Testimony of Gilbert Lord.)

in the Indictment on file herein, to wit, Selling Liquor Without a License, committed in the Fourth Judicial Division, Territory of Alaska, on the 15th day of August, 1952, by the defendant, possessing and selling intoxicating liquor, to wit, beer of an alcoholic content of more than one per cent (1%) by volume, to James Carroll, without he, the said Gilbert Lord, having procured the necessary license to sell intoxicating liquor, and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause being shown or appearing to the Court, and the Court being fully advised in the premises, [78]

It Is Ordered and Adjudged that the defendant is guilty as charged in said Indictment of the crime of Selling Liquor Without a License, and that he pay to the Clerk of the Court the sum of Five Hundred Dollars (\$500.00), assessed against him as a fine herein, and that he be imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the same shall serve as the Commitment herein, and that the said defendant pay the costs of this action in the sum of \$19.50, to be taxed by the Clerk of the Court.

(Testimony of Gilbert Lord.)

Done at Fairbanks, Alaska, this 16th day of November, 1953.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed and entered Nov. 21, 1953.

(Finish reading.)

Mr. Stevens: And the attachment is a certificate of the Clerk of the Court that this is a true copy of the Judgment and Commitment.

Q. (By Mr. Stevens): Now, Mr. Lord, you just stated to Mr. Hurley that you never had any intoxicating liquor for sale in Fort Yukon?

A. Yes, sir. [79]

Q. Now, how can you say that in view of this evidence?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial, not proper cross-examination.

The Court: Objection overruled.

Mr. Hurley: I take exception.

A. I pleaded guilty to that charge.

Q. (By Mr. Stevens): But you said you never sold any?

A. I pleaded guilty for financial reasons.

Q. You now deny that you sold liquor at that time? A. That's right.

Q. You never possessed liquor for sale; Mr. Hurley asked you if you possessed liquor for sale, is that correct? A. That's correct.

(Testimony of Gilbert Lord.)

Q. And you never have sold any liquor?

A. That's correct.

Q. And you didn't sell this liquor that is before the court to the two people that testified that you did sell it?

A. That's right.

Q. Now, did Fred Ross come to your house on the 18th of February?

A. I can't remember when it was, the 18th or any other day, he came up there one night.

Q. Just one night?

A. Yes.

Q. Just the one time that night?

A. Yes. [80]

Q. Did he come back again the same night?

A. Not that I know of.

Q. Then the testimony of Mr. Ross that he was there twice that night is wrong; is that correct?

A. I don't know. He could have been in the house and I wouldn't know it.

Q. How about Silas John; was he there on the 19th of February?

A. I don't know if it was the 19th or what day of the week it was he was there.

Q. Then the testimony of both Mr. John and Mr. Wilson and Mr. Elliott is wrong. He was not there twice?

A. Not necessarily. He could have been in the house, as I say, without me knowing it.

Q. Oh, he just walked through, is that it?

A. It's a big house.

Q. I beg pardon?

A. It's a big house. I live upstairs. It is open

(Testimony of Gilbert Lord.)

downstairs. He could have been down there for all I know.

Q. How do you get in your house, upstairs?

A. You go, you go up the back or the front and through another stairway.

Q. And did you not let Mr. John out at all either time he came to your house?

A. As far as I know, it was only one time he was there.

Q. Oh, he was only there one time. [81]

A. On that particular day.

Q. Now, you stated that you never made home brew? A. I didn't say that I never made it.

Q. You never made it for sale? A. No.

Q. Then the testimony of Mr. John that you not only sold him this bottle of home brew but also gave him a drink of the home brew while he was there is also false; is that correct?

A. That's false. It is probably the other way around, if anything.

Q. Oh, he made the home brew and gave it to you?

A. Well, I don't know if he made it. He used to come and visit me quite often and bring it with him.

Q. Do you have a gallon jug of wine in your house? A. Right now you mean?

Q. Did you have at the time Mr. John came to your house? A. Yes.

Q. And did you pour the wine into these bottles when he came? A. No.

(Testimony of Gilbert Lord.)

Q. You did not pour any wine into these bottles?

A. No.

Q. You have stated that you do have liquor sent into you at Fort Yukon? [82]

A. Yes.

Q. And did you have this Imperial whiskey sent in to you?

A. No, sir.

Q. Did you ever have Imperial whiskey sent in to you?

A. I have had different brands of whiskey. I don't remember if it was Imperial or any other kind.

Q. Are you aware that before a person may sell liquor in the Territory of Alaska that he must procure a license?

A. I am.

Q. And were you aware of that at the time that Government's Exhibit "H" was delivered to you, at the time you entered your plea for financial reasons, as you say, on that other case? Did you know it was a crime to sell liquor without a license?

A. I did.

Q. And that was just in November of last year, was it not?

A. Yes.

Q. And did you attempt to procure a license to sell liquor in Fort Yukon for this year?

A. I was going to but I was told there wasn't any chance to get a license over there.

Q. Oh, you thought about getting a license?

A. Yes, sir.

Q. And you couldn't get one? [83]

A. I didn't apply for one.

Q. Why couldn't you get one?

(Testimony of Gilbert Lord.)

A. Well, I built a place over there one time, built a night club and I was going to get a license for it and I was told the same thing. It is impossible to get a license over there.

Q. Why is it impossible?

A. According to what they say, the drys over there fight it.

Q. In other words, according to the law of the Territory, a certain percentage of the people in the area in which liquor is going to be sold have to consent and in Fort Yukon they will not consent; is that right?

A. They will, but according to the way they used to do, you present your application here to the court for a liquor license, and they give the dry element over there thirty days to fight it. Although you have all the names you need on your list, why these people over there they sign the petition against your license so that cancels you out. That happened to me two or three times.

Q. That happened to you two or three times?

A. Yes.

Q. And yet you never sold liquor without a license?

A. No.

Q. And you pleaded guilty to this one just for financial reasons?

A. That's right. [84]

Q. And you even thought about getting a license for this year, is that your testimony?

A. Yes.

Q. You didn't intend to sell liquor this year?

A. If I would have got a license I would have sold it.

(Testimony of Gilbert Lord.)

Q. Failing to get a license, knowing you could not get a license due to the objections of Fort Yukon people, you went right ahead and sold this liquor? A. No.

Q. You didn't have anything to do with any of these bottles that are in evidence? A. No.

Q. Then this is just a trumped-up charge on the part of the people of Fort Yukon against you; is that right?

A. I wouldn't say "people of Fort Yukon," trumped up by somebody. I wouldn't say who.

Q. And the witness who stated they saw both Silas John and Fred Ross enter your house on two separate occasions for each one of the witnesses, Fred Ross and Silas John, and saw them come out with this whiskey, their statements were false, is that right?

A. I don't know. They could have had it there.

Q. Was there anyone else in your house selling liquor?

A. Nobody selling liquor in my house.

Q. Was there anyone else residing there on the 18th, 19th and 20th of February? [85]

A. Me and my family and the lady that takes care of my children.

Q. Were they selling liquor?

A. If you will excuse me, they are grade school students.

Q. Then you admit that Fred Ross did come to see you at least once during February?

A. Yes.

(Testimony of Gilbert Lord.)

Q. And Silas John was also there once?

A. Oh, he has been there more than once. Him and I used to be what you might call old friends. He used to come up and visit me and talk about the old days.

Q. And his testimony that he has had home brew at your place many times is false; is that right?

A. He had it there, but if he did he brought it there himself.

Q. This home brew that is in evidence, did he bring that to your house? A. I don't know.

Q. Did you ever see any of these bottles before you came to this courtroom?

A. Not to my knowledge.

Mr. Stevens: Your witness, Mr. Hurley.

Mr. Hurley: That's all.

(Witness excused.)

Mr. Hurley: The defense rests. [86]

The Court: Call your next witness.

Mr. Stevens: I believe, your Honor, that Mr. Hurley stated the defendant rests.

Mr. Hurley: I did.

The Court: Very well, then. Do you have any rebuttal, Mr. District Attorney.

Mr. Stevens: Just one moment please, your Honor. I recall Mr. Elliott.

NORMAN ELLIOTT

recalled as a witness in behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct Examination in Rebuttal

By Mr. Stevens:

Q. Mr. Elliott, you previously testified, I believe, this is correct, that on one of the visits to Gilbert Lord's house, Mr. John came out the rear door?

A. Yes, sir; on both occasions he came out the rear door.

Q. On both occasions he did? A. Yes, sir.

Q. Now, on either occasion when Mr. John came out, did you see anyone else as he came out of the door? A. On the first visit, sir.

Q. And who was that?

A. Gilbert Lord, sir.

Q. And Gilbert Lord was at the door with him when he left? [87]

A. Yes, sir, and I'm sure it was Gilbert Lord because the flashing beacon from the airport illuminates about every ten seconds the entire back of the roadhouse which is painted white. There was snow on the ground and Lord was carrying a flashlight which he flashed.

Mr. Stevens: Your witness, Mr. Hurley.

Cross-Examination

By Mr. Hurley:

Q. You say he let him out? A. Yes, sir.

Q. What did he do in order to let him out?

(Testimony of Norman Elliott.)

A. Opened the door, sir.

Q. And did he have any liquor, Mr. Lord, when he opened the door?

A. I don't know if Mr. Lord did or not, sir. No, sir, I don't know.

Mr. Hurley: That's all.

Mr. Stevens: Thank you very much, Mr. Elliott.

(Witness excused.)

Mr. Stevens: The Government rests, your Honor.

The Court: We will take a ten-minutes recess.

(Thereupon, at 3:23 p.m., the court took a recess until 3:35 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is recessed for ten minutes.

The Court: Counsel stipulate all members of the jury are present? [88]

Mr. Hurley: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: How much time do you gentlemen want for argument?

Mr. Hurley: Just a few minutes, your Honor, as far as the defendant is concerned, twenty or thirty minutes. Fifteen or twenty minutes, something like that.

The Court: All right. We will make it twenty minutes maximum. Is that enough?

Mr. Stevens: Yes, your Honor.

The Court: Very well.

(Thereupon, Mr. Stevens presented a closing argument to the Jury in behalf of the plaintiff.)

(Thereupon, Mr. Hurley presented a closing argument to the Jury in behalf of the defendant.)

(Thereupon Mr. Stevens presented a rebuttal argument to the Jury in behalf of the plaintiff.)

(At this time, the Court read the instructions to the jury as follows:) [89]

* * *

(At the conclusion of the court reading the instructions to the jury, the following proceedings were had.) [96]

The Court: Attorneys may come forward for exceptions.

Mr. Stevens: No exceptions, your Honor.

Mr. Hurley: No exceptions.

The Court: Very well. The jury may retire in the custody of the bailiffs.

(At 4:00 p.m., the jury, in charge of its sworn bailiffs, retired to enter upon its deliberations.)

[Endorsed]: Filed May 27, 1954. [97]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings listed below the Designation of Record of the defendant and comprise all proceedings in this cause, requested by pellants, viz.:

1. Indictment.
2. Order extending time to file, record, and docket cause.
3. Undertaking on Appeal on Admission to Bail.
4. Notice of Appeal.
5. Judgment and Commitment.
6. Motion to Vacate Sentence.
7. Verdict.
8. Instructions to the Jury.
9. Praecipe for Transcript of Record.
10. Appellant's Statement of Points and Designation of Record.

Transcript of Proceedings, separately bound.

Witness my hand and the seal of the above-entitled Court this 29th day of June, 1954.

[Seal] /s/ JOHN B. HALL,
 Clerk of Court.

[Endorsed]: No. 14407. United States Court of Appeals for the Ninth Circuit. Gilbert Lord, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division..

Filed July 1, 1954.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14407

GILBERT LORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS
TO BE RELIED UPON

Comes Now the appellant above named, by his attorneys, Mike Stepovich and Julien A. Hurley, and designates the following as the points to be relied upon on appeal by appellant in the above-entitled action, and are as follows:

1. The indictment fails to state facts sufficient to constitute a crime.

2. The Trial Court erred in sustaining the objection of appellee in regard to the search that took place on the premises of appellant, which is contained on Page 44 of the Transcript of Record.

3. The Trial Court erred in admitting Government's Identification No. 8 over the objection of appellant, contained in the Record on pages 78 and 79, and the Trial Court further erred in overruling the objection of the appellant on Pages 79 and 80 of said Transcript, for the reason that the evidence offered by appellee was incompetent, irrelevant and

immaterial, and not proper cross-examination,
which said objection was overruled by the Court.

/s/ MIKE STEPOVICH,

/s/ JULIEN A. HURLEY,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1954.

No. 14409

United States
Court of Appeals
for the Ninth Circuit

CLAUDE E. SPRIGGS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Arizona

FILED

OCT 1 1954

PAUL P. O'BRIEN

CLERK

No. 14409

United States
Court of Appeals
for the Ninth Circuit

CLAUDE E. SPRIGGS,

Appellant,

vs.

UNITED STATES OF AMERICA,

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Transcript of Record

Appeal from the United States District Court
for the District of Arizona

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[Clerk's Note: When deemed likely to be of important *nature*, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CLAUDE E. SPRIGGS, Per Se

730 W. Coronado Road,
Phoenix, Arizona,

Appellant.

JACK D. H. HAYS,

United States Attorney,

ROBERT S. MURLLESS,

Assistant United States Attorney,

Federal Building,
Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court for the
District of Arizona

No. C-10711-Phx.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLAUDE E. SPRIGGS, Defendant.

INDICTMENT

Violation: 26 U.S.C. 145(b) (Attempt to defeat
and evade income tax)

The Grand Jury charges:

That on or about the 7th day of January, 1948, at Phoenix, County of Maricopa, State and District of Arizona, Claude E. Spriggs did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, a false and fraudulent income tax return wherein it was stated that his net income for said calendar year was the sum of \$1,928.17 and that the amount of tax due thereon was none, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$7,049.15, upon which said net income there was owing to the United States of America an income tax of \$1,058.03.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.

/s/ MARVIN L. CHAPMAN,
Foreman

/s/ F. E. FLYNN,
United States Attorney

[Endorsed]: Filed February 26, 1953.

[Title of District Court and Cause.]

MOTION BY DEFENDANT TO DISMISS
INDICTMENT

The defendant moves that the Indictment be dismissed on the following grounds:

The defendant has been acquitted and in jeopardy of conviction of the offense charged therein in the case of United States of America vs. Claude E. Spriggs, in the United States District Court, for the District of Arizona, Case No. C-9558-Phx., terminated on the 19th day of November, 1951, at Phoenix, Arizona and by a judgment entered and filed in this Court at Phoenix, Arizona, on November 21, 1951.

Dated at Phoenix, Arizona this 20 day of March, 1953.

CHOISSER & CHOISSER,
/s/ By JACK CHOISSER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed March 20, 1953.

[Title of District Court and Cause.]

ANSWER IN OPPOSITION TO MOTION BY
DEFENDANT TO DISMISS INDICTMENT

Comes now the United States Attorney and for answer in opposition to motion by defendant, Claude E. Spriggs, to dismiss indictment, states as follows:

I.

That defendant has not been acquitted of the offense charged in the indictment but was convicted on a similar charge by verdict of a jury in Phoenix, Arizona, on November 16, 1951, and was sentenced on November 19, 1951.

II.

That the judgment of a conviction on November 16, 1951 was reversed by the United States Court of Appeals for the Ninth Circuit in a substituted opinion filed September 3, 1952, which set aside an opinion filed on August 20, 1952, reported as United States vs. Spriggs, 198 F.2d 782.

III.

That the first indictment (No. C-9558-Phx.) was dismissed by order of this Court on October 14, 1952, by reason of a stipulation entered into by the then United States Attorney and the attorney for defendant.

IV.

That the present indictment was returned by the Grand Jury on February 27, 1953.

V.

That at his insistence, on appeal, defendant successfully secured a reversal of his prior conviction and he cannot now claim that his action in having the judgment of conviction set aside shields him from another trial on the same charge.

VI.

That defendant by entering into a stipulation to dismiss the original action is estopped from asserting such dismissal as a bar to another trial on the same charge.

VII.

That on reversal of a judgment by the Court of Appeals, without further direction, a new trial follows.

Wherefore, the Government prays that the said motion of the defendant should be overruled.

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

[Endorsed]: Filed January 7, 1954.

[Title of District Court and Cause.]

PLEA IN BAR

Comes Now the defendant, Claude E. Spriggs, and for his plea in bar to the indictment in the above entitled matter, alleges and states:

That on the 3rd day of April, 1951, in Cause No.

C-9558-Phx. the Grand Jury indicted the defendant, Claude E. Spriggs on three counts of tax evasion, for the years 1944, 1946 and 1947. That upon trial of the matter the defendant was acquitted on Counts I and II of the Indictment; that prior to the trial of the defendant, defendant demanded and was granted a Bill of Particulars and the Bill of Particulars as to Count III of the Indictment showed the net income for 1947 in the sum of \$7,048.95; that the Bill of Particulars further showed the unreported taxable capital gains consisted of two items (a) taxable portion of profit on sale of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona, \$1,698.15 (b) taxable portion of profit on sale of Lot 5, Eastwood Place, Phoenix, Arizona, in the amount of \$544.64. The third portion of Count III of the Indictment under the Bill of Particulars was depreciation overstated in the sum of \$2,978.60.

The indictment further stated that upon this Third Count there was due a tax in the sum of \$1,058.03.

The present indictment and the previous indictment are for the same years, for the same amount of taxes due, and for approximately the same amount of income, except a difference of twenty cents.

Therefore this defendant believes that the present indictment and Count III of the former indictment cover the same years, the same alleged violation and therefore a determination of the prior

indictment constitutes a plea in bar to the present indictment.

That on the 21st day of November 1951, in Cause No. C-9558, Phx., the judgment was entered by the above entitled Court, of guilty and same was filed upon the 21st day of November 1951.

Thereafter an appeal was made to the United States Court of Appeals for the Ninth District and said matter was reversed and the Court therein states "Upon trial, appellant was acquitted of Counts I and II upon his motion for a directed verdict of acquittal. He was also acquitted upon portions of Count III." The Court further went on to state that the only matter that was determined was depreciation overstated, which was the third item in Count III of the former indictment.

In the opinion of the Court of Appeals, reported at U. S. vs. Spriggs, 198 Fed (2) 782, the Court stated "whether this evidence, upon which the judgment below must stand or fall, is to be regarded as a confession, or as admissions, or as extra judicial statements, is of no consequence here. Under any name, they are insufficient to sustain a conviction, for there has been no independent proof of any crime having been committed."

The Court, by this finding, has reversed this case for insufficient evidence as the sole ground of reversal, alleging therein they need not go into whether there was any error committed by the Court in the trial of the matter.

That thereafter the mandate issued out of the Court of Appeals and the same was filed and re-

corded upon the records of this Court; that on the 14th day of October, 1952, which was after the mandate had been filed in this Court, the United States attorney and W. T. Choisser, attorney for defendant, made and entered into a Stipulation wherein they said that by reason of the mandate of the appellate court, spread upon the records of the above entitled court, on the 13th day of October, 1952, the Court made, by order of this court, dismissed the action.

That on the 15th day of October, 1952, the judgment of this Court made and entered its order that the action, U. S. of America, plaintiff, vs. Claude E. Spriggs, Cause No. C-9558, is hereby dismissed and the fine and the Court costs deposited in the Registry of the Court be returned to the defendant, Claude E. Spriggs.

Since the opinion of the Appellate Court showed there was insufficient evidence to sustain the conviction and since the Stipulation referred to the mandate of the Appellate Court, it is presumed that said action was dismissed under Rule 48 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. Federal Rules of Criminal Procedure, page 537, under Rule No. 48 which became effective on October 20, 1949 and was in force and effect at the time this order of dismissal was made.

In the case of U. S. vs. Doe, 101 Fed. Supp. 609, the Court held that a dismissal of criminal prosecution can be approved only on showing that the government lacks evidence to warrant a prosecution. This case held further that Rule No. 48 of the

Federal Rules of Criminal Procedure, is that the judge must be convinced of public interest and that there had been a showing by the United States attorney that he had insufficient evidence to warrant a prosecution.

Therefore when the order of the court dismissing Cause No. C-9558, Phx., it was done with a showing on the part of the United States attorney, that he lacked evidence to warrant a prosecution.

The Court in the case of *State vs. Gates*, 25 NE (2) 471, states that where a defendant was discharged by reason of insufficiency of the evidence the defendant had been put in legal jeopardy.

Rule No. 48 of the Rules of Criminal Procedure, sub (a) thereof, states that when the United States attorney dismisses an action by leave of the court the prosecution thereupon shall terminate.

Therefore, since the Appellate Court has decreed by its judgment that Counts A and B of the Bill of Particulars to the Third Count of the indictment of Cause No. C-9558-Phx., the defendant had been acquitted by an order of the Appellate Court, and any further prosecution under the present indictment for the same count would certainly be placing the defendant in double jeopardy.

That since the dismissal of this matter, had on the 15th day of October, 1952, by an order of the above entitled Court, upon the ground of insufficient evidence and under the provisions of Rule 48 of Federal Rules of Criminal Procedure, a further prosecution under the present indictment would certainly deprive this defendant of his con-

stitutional rights and have this defendant stand the expense of an additional trial wherein he has heretofore been tried and acquitted and place his life and liberty in double jeopardy.

Wherefore, defendant prays that this Court will sustain this plea in bar and dismiss the indictment in the above entitled matter, with prejudice.

/s/ CLAUDE E. SPRIGGS,
Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 15, 1954.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes Now the defendant and moves this Honorable Court for an order requiring the United States of America, by and through its attorneys, to set forth specifically the items, sums, figures and facts showing the alleged income, of the tax due thereon, and the sums from which the United States of America derived such facts, items, income and figures from which it made the calculations as to the sums contained in the indictment herein;

As to the items from which the net income of \$7,049.15 was computed and as to the computation from which an income tax of \$1,058.03 was computed;

The dates upon which the defendant received

said items of income, the persons or sources of said items of income;

Dated this 8th day of February, 1954.

/s/ CLAUDE E. SPRIGGS,
Defendant

Federal Rule of Criminal Procedure, Rule 7 (f).

Memo of Points and Authorities

The items of income upon which the United States Government bases its charges of income tax fraud and evasion should be specifically set forth so that the defendant may prepare for his trial and be apprised of the nature of the charges against him.

Himmelfarb vs. United States, 175 Fed (2d)
924

United States vs. Empire State Paper Corp.,
8 Fed. Supp. 220

Rose vs. United States, 128 Fed (2d) 622

United States vs. Yoffe, 52 Fed. Supp. 175

Acknowledgment of Service attached.

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF FEBRUARY 8, 1954

Honorable Claude McColloch, United States District Judge, specially assigned, presiding.

This case comes on regularly for arraignment this day. Robert S. Murlless, Esquire, Assistant

United States Attorney, appears for the Government. The defendant, Claude E. Spriggs, is present in person without counsel, acting as his own attorney, and is now duly arraigned. The defendant waives the reading of the Indictment and a copy thereof is handed to him.

It Is Ordered that this case be continued three days for plea, to allow defendant to file Motion for Bill of Particulars, and that all motions herein be set for hearing Wednesday, February 10, 1954, at 12:30 o'clock p.m.

[Title of District Court and Cause.]

ANSWER IN OPPOSITION TO MOTION FOR BILL OF PARTICULARS

Plaintiff, United States of America, resists motion for bill of particulars and respectfully shows this court:

I.

That the particulars requested are within the knowledge of the said defendant;

II.

That the particulars requested are all evidentiary matters to be given in evidence at the trial, and compliance therewith could not be made without injurious disclosure of the plaintiff's evidence; nor are such matters properly a part of the indictment in any respect;

III.

That the particulars requested all call for the plaintiff to define the specific means employed in committing the offenses charged;

IV.

That the indictment herein is certain and sufficient and is not broad nor indefinite, and does not endanger the defendant as to further prosecution on the same charges, nor does it make it impossible for him to prepare his defense;

V.

That the indictment herein properly and sufficiently alleges offenses under the laws of the United States, to-wit, Section 145(b) of Title 26, United States Code.

Respectfully submitted,

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

Memorandum of Points and Authorities in Opposition to Motion for Bill of Particulars

Defendant has filed with this court a motion asking for a bill of particulars with respect to "the items, sums, figures and facts showing the alleged income, of the tax due thereon, and the sums from which the United States of America derived such facts, items, income and figures * * * calculations

as to the sums contained in the indictment * * *.”

Defendant further requests particulars as to the dates upon which he is alleged to have received said items of income.

The granting of a bill of particulars is based upon a bona fide necessity of obtaining an amplification of the indictment in order to obtain a proper defense to the charges made therein. At best the requirement that the government file a bill of particulars only explains the indictment. At worst the requirement that the government provide a bill of particulars imposes an unreasonable sanction and limitation of the government's proof, in a particular case. If the defendant could compel the government to disclose its evidence in advance of trial, he would be benefited, for legally he is entitled to only such specifications as will apprise him of the nature of the charges in the indictment.

From the request filed for a bill of particulars, it seems readily apparent that the material sought is evidentiary in character and seeks a complete discovery of the evidence to be used to prove the government's case. Why each of the items is significant is not shown. The result is that it could only be to delimit and hinder the government in its proof of this case. Further, the request for material is peculiarly within the knowledge of the defendant. It is well settled that such proof is not the province of a bill of particulars.

Braatelian vs. United States, 147 F.2d. 888
(C.A. 8th)

Wong Tai vs. United States, 273 U.S. 77, 82

Nye and Nissen vs. United States, 168 F.2d 846, 851 (9 Cir.), aff. 336 U.S. 613

Evans vs. United States, 153 U.S. 584, 590

United States vs. Skidmore, 123 F.2d 604, 607

United States vs. Wexler, 6 F.Supp. 258 (S.D. N.Y. 1933), affirmed 79 F.2d 526 (C.C.A. 2d, 1935, certiorari denied (1936) 297 U.S. 703

Lisansky vs. United States, 31 F.2d 846

Levin vs. United States, 5 F.2d 598

For the reasons stated, this court should hold the indictment herein to be sufficient and should deny the defendant's motion for a bill of particulars.

Respectfully submitted,

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

[Endorsed]: Filed February 9, 1954.

[Title of District Court and Cause.]

RESPONSE TO DEFENDANT'S MOTION FOR BILL OF PARTICULARS

Comes Now the United States of America, plaintiff herein, by Frank E. Flynn, United States Attorney for the District of Arizona, and E. R. Thurman, Assistant U. S. Attorney, and in response to defendant's motion for bill of particulars respectfully submits the following:

* * * * *

III.

Count III of the Indictment:

Net Income for 1947.....\$7,048.95

Unreported taxable capital gains consist of the following:

(a) Taxable portion of profit on sale of
Lots 7 and 8, Block 15, Collins Addition,
Phoenix, Arizona, to Jesse Arreola
on 8/14/47\$1,698.15

(b) Taxable portion of profit on sale of
Lot 5, Eastwood Place, Phoenix, Arizona,
to Howard M. Vandenberg on
11/20/47 544.64

Total unreported taxable capital gains.....\$2,242.79

Depreciation overstated:

This item consists of the overstatement
of depreciation by the defendant as
the result of his having falsely represented
the cost of his property located
on Henshaw Road, Phoenix, Arizona,
on which he claimed excessive depreciation
in the amount of..... 2,978.60

Understatement of net income..... 5,221.39

Reported net income per return..... 1,928.17

Total 7,149.56

Arithmetical error on return..... 100.61

Net income per indictment.....\$7,048.95

FRANK E. FLYNN,

U. S. Attorney for Dist. of Arizona,

/s/ E. R. THURMAN,

Assistant U. S. Attorney,

Attorneys for Plaintiff

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

MINUTE ENTRY OF FEBRUARY 10, 1954

Honorable Claude McColloch, United States District Judge, specially assigned, presiding.

Robert S. Murlless, Esquire, Assistant United States Attorney, appears for the Government. The defendant, Claude E. Spriggs, is present in person without counsel, acting in his own behalf. The defendant's Motion to Dismiss, and Plea in Bar, and Motion for Bill of Particulars, are now argued by the defendant and counsel for the Government and the court reserves ruling thereon.

The defendant is arraigned, waives the reading of the Indictment. The defendant's plea is not guilty, which plea is now duly entered. It Is Ordered that the defendant be allowed to remain on his own recognizance. It Is Ordered that said Motion to Dismiss, Plea in Bar and Motion for Bill of Particulars be and they are denied.

[Title of District Court and Cause.]

ORDER

In the above entitled matter, the motion of plea in bar filed by the defendant, argued by him in his own behalf, and for the plaintiff by Mr. Jack D. H. Hays, United States Attorney for the District of Arizona, by Robert S. Murlless, Assistant United States Attorney, this 10th day of February, 1954,

and the court being fully advised in the premises, it is Ordered:

That the plea in bar of defendant is granted in part and denied in part: that the plea in bar is granted with respect to the specific items of alleged unreported income, and it is denied with respect to the specific items of alleged fraudulent depreciation, as appears in the indictment in the above entitled cause.

Dated this 25th day of February, 1954.

/s/ CLAUDE McCOLLOCH,
Judge, District Court for the Dis-
trict of Arizona

[Endorsed]: Filed February 25, 1954.

[Title of District Court and Cause.]

MOTION OF PLAINTIFF FOR REHEARING
ON DEFENDANT'S PLEA IN BAR

(Double Jeopardy)

Plaintiff, United States of America, now respectfully moves this Honorable Court for a rehearing on the defendant's plea in bar, filed in the above entitled matter, upon which an order was made on or about the 25th day of February, 1954, granting in part, said plea: this motion is made to the end that this Honorable Court's judgment or order, above mentioned, be modified to deny said plea in bar.

This motion is made upon the grounds, for the reasons and upon the authorities set forth in Memorandum hereto attached.

Dated this 12 day of March, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

Notice

To: Claude E. Spriggs, Defendant and Claude E. Spriggs, Attorney at Law, 730 West Coronado Road, Phoenix, Arizona:

You will please take notice that the above entitled motion will be urged, to the above entitled Court, on the 22nd day of March, 1954, at the Court Room in the Federal Court House Building, Phoenix, Arizona, at 12:30 o'clock in the afternoon of said day or soon thereafter as counsel may be heard.

Dated this 12 day of March, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

Memorandum

Defendant, Claude E. Spriggs, has filed various motions, in the above entitled matter, to plead double jeopardy. One of these motions was a motion

to dismiss. Another of these motions was designated "Plea in Bar".

These motions had, as their significant assertion, the claim that the Indictment, in No. C-10,711-Phx., is barred by reason that it states the identical offense, against the same defendant, upon which that defendant was once before put in jeopardy. The plea goes upon the basis that the Indictment, in the above entitled matter, constitutes a second jeopardy.

Summary of Prior Proceedings

On April 3, 1951, the grand jury returned an Indictment charging the defendant, Claude E. Spriggs, with three counts of income evasion; Count I was as to the year 1944; Count II was as to the year 1946; and Count III was as to the year 1947. Upon trial defendant was granted judgment of acquittal on Counts I and II above mentioned, and upon Count III, above mentioned, was found guilty by verdict of a jury. Defendant appealed the conviction and judgment was reversed by the United States Court of Appeals for the Ninth Circuit in a substituted opinion filed September 3, 1952, which set aside an opinion filed August 20, 1952. This opinion is reported as *United States vs. Spriggs*, 198 Fed. 2d. 782.

The first Indictment (No. C-9,558-Phx.), was dismissed by order of this Court on October 14, 1952, by reason of a stipulation entered into by the United States Attorney and the attorney for the defendant. The present Indictment (No. C-10,711-Phx.) was returned by the grand jury on Febru-

ary 27, 1953, and like the third count of the April 3, 1951 Indictment, charges the defendant with attempted evasion of taxes for the year 1947.

Plea in Bar was filed, by defendant, directed to Indictment in No. C-10,711-Phx., which is a restatement of Count III of Indictment in No. C-9558-Phx., Bill of Particulars filed in No. C-9558-Phx. as to said third Count, included two items of unreported alleged taxable gains.

Subsections (a) and (b), p. 8 Transcript of Record No. C-9,558-Phx., U.S.A. vs. Spriggs, C.A. 13258

Bill of Particulars as to said Count III included one item of alleged fraudulent restatement of depreciation.

Plea in Bar was granted (in No. C-10,711-Phx.) in part by order of February 25, 1954, barring specific items of alleged taxable gains unreported as set forth in Bill of Particulars filed in No. C-9,558-Phx.

Plaintiff filed the instant motion for rehearing and this memorandum to secure reconsideration of this ruling, to the end that said Plea in Bar be denied, in toto.

The Question of Double Jeopardy

There follows certain extracts from the official transcript of record, United States Court of Appeals, No. 13,258, Claude E. Spriggs, Appellant, vs. United States of America, Appellee, which is in No. C-9,558-Phx., is contained on page 4 of said Transcript of Record; it will appear that Bill of

Particulars, with respect to Count III of first Indictment, is contained on page 8 of the Transcript of Record: it will be noted that the following motions were made and rulings were had, on pages 16 and 17 of said Transcript of Record:

“* * * Counsel for defendant now moves for a judgment of acquittal as to Count II of the Indictment on the ground the evidence adduced does not substantiate the allegations of Count II, and moves to strike portions of Bill of Particulars as to Count II.

“It is Ordered that said Motion to Strike and said Motion for Judgment of Acquittal be granted as to Count II of the Indictment.

“Counsel for defendant now moves for Judgment of Acquittal as to Count 3 of the Indictment on grounds and for the reasons the evidence adduced does not sustain the allegations of Count 3 and moves to strike portions of Bill of Particulars as to Count 3.

“It is Ordered that subdivisions (a) and (b) of said Bill of Particulars as to Count 3 of the Indictment be stricken, and

“It is Ordered that said Motion for Judgment of Acquittal as to Count 3 of the Indictment be denied.

“And thereupon at 4:50 o'clock p.m., it is Ordered that the further trial of this case be continued until November 16, 1951, at 10:00 o'clock a.m., to which time the defendant and counsel are excused. * * *”

Pages 15 and 16, Transcript of Record.

It will further appear that the defendant made

a motion for judgment of acquittal at the close of all of the evidence in the case:

Page 17, Transcript of Record.

It further appears that defendant made a motion for judgment of acquittal notwithstanding the verdict:

Page 19, Transcript of Record.

It appears on Page 18, Transcript of Record, referring to verdict, and also on Page 19, that the defendant was found guilty of Count III of the Indictment.

Pages 18 and 19, Transcript of Record.

The above motions for judgment of acquittal also were denied.

Page 21, Transcript of Record.

During the court of the trial motions to strike each of the subdivisions (a) and (b) of the Bill of Particulars as to Count III were granted. These motions and the orders with respect thereto appear at the top of Page 172 of Transcript of Record; at the top of Page 173, thereof; in the middle of Page 173 thereof; and at the bottom of Page 173 thereof, at which place this further proceeding in Court was had:

“The Court: Well, that will be stricken, then. And the depreciation. Let’s see, then, take the ’47 return, and on Line 1, the figure, (313) \$2,601.32, you add the depreciation overstated of \$2,978.60, so that figure would then be \$5,579.91.

“Mr. Choisser: Your Honor, may I be heard on that addition of depreciation overstated, \$2,978.60? I again submit that there is no competent evidence

from which that figure can be produced in any particular.

"The Court: There is evidence here upon which reasonable minds differ.

"Mr. Choisser: But, as to the amount, if your
* * *"

Page 173, Transcript of Record.

This matter was ruled upon on Page 174 of Transcript of Record, as follows:

"The Court: The motion for judgment of acquittal as to the 3d count is denied. The defendant will be on his proof. We will resume at 10 o'clock tomorrow morning as to the 3d count only. * * *"

From the foregoing it appears that the Honorable Peirson M. Hall, Trial Judge at the trial of the Indictment No. C-9,558-Phx. nowhere indicated that there should be a judgment of acquittal upon the third count. We have searched the record, at least, and find no more significant statements than we have set forth above. We are aware in this regard that the opinion filed September 3, 1952, in *Spriggs vs. United States*, 198 Fed.2d. 782 in the middle of the right hand column of the first page thereof, contains the following:

* * * "he was also acquitted upon portions of Count III * * *"

Spriggs vs. United States, supra, at page 782.

We believe that the quoted portion of the Circuit Court opinion, above mentioned, is an erroneous statement of the treatment that was given Count III by the trial judge. Humbly we suggest that an acquittal was not granted at the trial of No. C-

9,558-Phx. on a part of a charge nor upon a part "of an offense".

We urge the Court that "jeopardy" cannot be taken piecemeal, that the charge of Count III of the Indictment was a single offense, and that the rulings of the trial court were purely matters of evidence, rulings as to the admissibility of evidence as to taxable gain where cost basis was not shown. It had been determined that there was not adequate evidence to prove cost basis of two alleged "taxable gains". Those alleged taxable gains were ordered "stricken".

We call attention to that part of the reporter's transcript as evidencing the fact that the problem with respect to the specific items of income as taxable gains, in Count III, was purely a ruling upon evidence. They were unable to show the cost of the buildings, therefore the Court would not allow them to prove those as taxable gains.

Page 149, et seq. Transcript of Record.

We submit that the order of this Court granting, in part, defendant's plea in bar, said order being dated the 25th day of February, 1954, directed, as it is, to a one-count indictment, has the effect of barring a "part of a crime", or barring "evidence of a crime": For example; the gist of the offense in the indictment in No. C-10,711-Phx. is "attempted evasion of income tax liability for 1947".

Gusick vs. United States, 54 F.2d. 618 (C.A. 7th Cir.), certiorari denied, 288 U.S. 545

The specific items of alleged taxable gains, reflected in that portion of the Bill of Particulars

filed in No. C-9,558-Phx. directed to Count III of the indictment under that number, are only evidentiary, or, in other words, are only a part of the alleged crime.

Page 8, Transcript of Record.

The Government need not prove all of the alleged omitted income. The Government need only prove a substantial understatement of income, and a substantial attempted evasion of tax liabilities.

Gleckman vs. United States, 80 F.2d. 394, (C.A. 8th Cir.). The gist of the offense alleged is the filing of a false return, understating income tax liability in a substantial amount, and it is formulated upon the principle that the filing of the return for the tax year 1947 was the attempted fraudulent evasion of liability. We do not understand that this "offense" as above described, is barred by a former jeopardy. The partial denial of the plea in bar, with respect to this indictment, above mentioned, bears out the proposition that the "offense" is not barred. We respectfully submit that the concept of "former jeopardy" contemplates (1) the identical offense, with respect to which (2) the identical defendant, having theretofore been tried.

U.S.C.A. Constitutional Amendment, V.

Gramer vs. United States, (C.A. 9th Cir.), 191 F.2d. 741

United States vs. One Dodge Sedan, 113 F.2d. 552

Helvring vs. Mitchell, 303 U.S. 391

That, to be barred by former jeopardy, the offense must be the identical offense, and the defend-

ant must be the identical person theretofore charged and tried, seems to be without question. There are many cases to the effect, even, that where one offense is included in another offense, a trial and determination upon the included offense is not a jeopardy, to make the trial upon the inclusive offense a double jeopardy.

Vamvas vs. United States, 13 F.2d. 347

Ryan vs. United States, 216 F. 13

Our research, extensive though not exhaustive, has revealed no case in which a "part of a crime" was held to be barred by a "former jeopardy".

We respectfully request the Court's reconsideration of the order, above mentioned, to the end that it be modified to deny the plea in bar of this defendant, directed to this single-count indictment, in No. C-10,711-Phx.

Respectfully submitted,

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

[Endorsed]: Filed March 12, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MARCH 22, 1954

Honorable Claude McColloch, United States District Judge, specially assigned, presiding.

Robert S. Murlless, Esquire, Assistant United

States Attorney, appears for the Government. Defendant, Claude E. Spriggs, is present in person and by counsel, Darrell R. Parker, Esquire.

Plaintiff's motion for rehearing on defendant's Plea in Bar is now called for hearing. Said motion is now argued by respective counsel and submitted to the court.

It Is Ordered that the order of February 25, 1954, granting said plea in bar in part and denying said plea in bar in part, be and it is vacated.

[Title of District Court and Cause.]

**MOTION TO DISMISS (OR QUASH)
INDICTMENT**

(Plea of Res Judicata)

Comes Now the defendant Claude E. Spriggs, by his attorneys, undersigned, and respectfully moves the above entitled Court that an order be made and entered herein dismissing the Indictment in this cause (and/or quashing the said Indictment) upon the ground that all, or a substantial part and portion, of the matters encompassed by said Indictment have been disposed of by prior adjudication.

In order to avoid burdening the record herein, defendant adopts by reference as a part of this motion all of the grounds, reasoning and authorities heretofore set forth in the pleading previously filed in this cause and entitled "Plea in Bar".

Wherefore, defendant prays that this motion be heard at the time of, or prior to, trial of this case,

at an hour and date convenient to the Court, and that upon the consideration thereof an order be made herein dismissing the said Indictment and/or quashing the same.

Dated this 29th day of March, 1954.

PARKER & MUECKE,
/s/ By DARRELL R. PARKER,
Attorneys for Defendant

Authorities in Support of Motion

In support of the above and foregoing motion, counsel for defendant hereby incorporate by reference all the legal authorities and grounds and reasoning set forth in the pleading heretofore filed herein denominated as "Plea in Bar".

That in addition to the authorities hereinabove incorporated by reference, defendant proposes to rely upon the rule that the doctrine of *res judicata* applies equally to civil and criminal proceedings. The doctrine and application of *res judicata*, and the distinction between double jeopardy and *res judicata* are discussed in an opinion by Mr. Justice Douglas in *Sealfon vs. U. S.*, 332 U.S. 575, 92 L.Ed. 180. See also: 147 A.L.R. 992.

Counsel will also rely upon *Partmar Corporation vs. Paramount Pictures Theatres Corporation*, (February 8, 1954) 98 L.Ed. 301 (Adv. Sheet No. 8 to Vol. 98 L.Ed.) wherein Mr. Justice Reed, speaking for the United States Supreme Court, affirms the rule that a prior adjudication conclu-

sively disposes of all matters which were or might have been litigated or adjudged therein.

The United States Court of Appeals, having determined by its reversal of the prior judgment of conviction on the item of depreciation that the evidence was insufficient to sustain the conviction, and by inescapable inference that the Court should have either directed a verdict in favor of the defendant, or should have granted the motion for judgment notwithstanding the verdict, the issue even of depreciation is subject to the application of the doctrine of *res judicata*. Referring to certain evidence which was admitted, but which the Court of Appeals deemed inadmissible, the Court said on the second page of the decision of September 3, 1952:

“Even if the admissibility of such testimony be assumed, *arguendo*, the government case still falls far short of establishing the guilt of appellant by the further evidence required by our decision in *Davena, Jr., vs. United States*, No. 13,131, June 27, 1952, — F.2d. —.”

Furthermore, this defendant wishes again to urge the Court that the dismissal of the identical Indictment as is now before the Court, which was done by written stipulation and approved by order of the Court on October 15, 1952, operates under Rule 48 of the Federal Rules of Criminal Procedure to constitute a further adjudication of the matter favorable to this defendant, and that on either of alternative theories the doctrine of *res judicata* is

applicable and the Indictment here presented to the Court cannot stand.

PARKER & MUECKE,
/s/ By DARRELL R. PARKER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed March 29, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MARCH 31, 1954

Honorable Claude McColloch, United States District Judge, specially assigned, presiding.

This case comes on regularly for trial this day. Robert S. Murlless, Esquire, Assistant United States attorney, appears for the Government. The defendant, Claude E. Spriggs, is present in person with his counsel, Darrell R. Parker, Esquire.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case. It Is Ordered that all jurors not empaneled in this case be excused until April 1, 1954 at 10:00 o'clock a.m.

The court reserves decision on defendant's Motion to Dismiss (or Quash) Indictment (Plea of Res Judicata).

Opening statements to the jury are now made by respective counsel.

It Is Ordered that the defendant's Motion for a

Mistrial is denied and that the defendant's objection to introduction of any evidence is overruled.

Government's Case:

The following Government's witnesses testify on behalf of the United States: William McRae, Katherine Moss Fisher, H. M. Vandenburg, Joseph Cohen, Callota G. Arriola, R. A. Thompson, Harry C. Jones.

The following Government's exhibits are admitted in evidence:

2, Income Tax Return 1947.

4, Escrow Instructions re Vandenburg Property.

5, Escrow Instructions re Arieola property.

7, Closing Escrow Statement.

9, Agreement of Sale—Spriggs—Thompson.

10, Two Receipts.

11, Escrow Instructions.

12, Escrow Settlement.

13, Escrow Settlement Order No. 86577.

14, Escrow Settlement Order No. 88548.

It Is Ordered that the further trial of this case be continued until April 1, 1954, at 1:00 o'clock p.m.

Minute Entry of April 1, 1954

The jury and all members thereof, the defendant and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

Government's Case continued:

The following Government's witnesses testify on behalf of the United States: Charles R. Custin, C. L. Howard, C. L. Sparks, William McRae, Lowell

Frisinger, Charles E. Dyer, Charles A. Mathews, James Struckmeyer, C. L. Sparks, Lloyd M. Tucker.

The following Government's exhibits are admitted in evidence:

15, Escrow Statement Frank Murphy Purchase.

16, Photostat copy Application Spriggs for Title Insurance.

17, Photostat copy Receipt Frank Murphy.

18, 2 documents—Agreement and Supplemental Escrow.

1, Income Tax Return 1946.

21, Drawing of lots, store, restaurant.

3, Income Tax Return 1948 and amended return.

22, Affidavit of Claude Spriggs.

23, Original Depreciation Schedule.

It Is Ordered that further trial of the case be continued until April 2, 1954 at 1:00 o'clock p.m.

Minute Entry of April 2, 1954

The jury and all members thereof, the defendant and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

Government's Case continued:

The following Government's witnesses testify on behalf of the United States: Lloyd M. Tucker, Marjorie Ross, Don Hammon.

Government's Exhibit 24, Statement of Spriggs, is admitted in evidence. On motion of counsel for the Government, It Is Ordered that portions of Government's Exhibit 23 be stricken.

The Government rests.

In the absence of the jury, the defendant submits exhibits in support of Motion to Dismiss (or Quash) Indictment (Plea of Res Judicata). The following defendant's exhibits are received in evidence:

A, Minutes of Court C-9558.

B, Indictment C-9558.

C, Bill of Particulars.

D, Transcript of Record.

E, Mandate.

F, Opinion.

G, Stipulation and Order.

It Is Ordered that said Motion to Dismiss (or Quash) Indictment (Plea of Res Judicata) be and it is denied.

It Is Ordered that the defendant's Motion to Strike Testimony and Exhibits, is denied.

It Is Ordered that the defendant's Motion to Dismiss on account of Insufficient Evidence, is denied.

It Is Ordered that the defendant's Motion to Strike is denied.

Defendant's Case:

The following witnesses testify on behalf of the defendant: Arthur R. Beales, Mrs. Claude Spriggs.

Defendant's Exhibit A, Schedule of Depreciation Reserves, is admitted in evidence.

The defendant rests. Both sides rest. At the close of the evidence the defendant renews all motions heretofore made and It Is Ordered that said motions are denied.

It Is Ordered that further trial of this case be continued until April 5, 1954, at 1:00 o'clock p.m.

Minute Entry of April 5, 1954

The jury and all members thereof, the defendant and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

All the evidence being in the case is argued by respective counsel to the jury. Whereupon the court duly instructs the jury and the jury retire at 3:05 o'clock p.m. in charge of sworn bailiff to consider their verdict.

Subsequently at 5:16 o'clock p.m., the defendant and all counsel being present, the jury return into open court and are asked if they have agreed upon a verdict.

Whereupon, the foreman reports that they have agreed and presents the following verdict, to-wit:

[Title of Cause.]

Verdict

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Claude E. Spriggs, guilty as charged in the indictment.

Jeanne T. Otey, Foreman

The verdict is read as recorded and the jury is discharged from the further consideration of this case.

It Is Ordered that this case be continued for sentence and that the defendant be allowed to remain on his own recognizance.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Claude E. Spriggs, guilty as charged in the indictment.

/s/ JEANNE T. OTEY, Foreman

[Endorsed]: Filed April 6, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT

Comes Now the defendant, by his attorneys undersigned, and respectfully moves the above entitled Court for judgment of acquittal notwithstanding the verdict, upon the following grounds and for the following reasons, to-wit:

1. That all matters and things contained in the Indictment in this cause have heretofore been adjudicated in Cause No. C-9558 in this Court and in the resultant appeal to the United States Court of Appeals in the case of Spriggs vs. U. S., 198 F.2d 782, and the said adjudications have been in favor of this defendant and against the Government, and all matters contained in the Indictment herein are res judicata.

2. That the Indictment in this cause has hereto-

fore, with the approval of the United States District Court, been dismissed in writing, the Court having made such an order on October 15, 1952 (Defendant's Exhibit "G" in support of Motion to Dismiss), and under the general principles of res judicata, and in particular under the provisions of Rule 48 of the Federal Rules of Criminal Procedure, the dismissal of the prior Indictment constitutes an adjudication exonerating this defendant of the charge upon which he now stands convicted, and by the terms of said Rule terminates the said prosecution.

3. That in the trial of this case the Court has admitted evidence under sub-sections (A) and (B) of the Bill of Particulars (Exhibit "C" in evidence in support of Motion to Dismiss), whereas, this defendant has heretofore been acquitted upon all matters contained in the aforesaid sub-sections of the said Bill of Particulars.

4. That the trial of this defendant upon the Indictment herein constitutes placing the said defendant for a second time in jeopardy for the same offense.

5. That the evidence, and the whole thereof, is insufficient to sustain the conviction of this defendant under the Indictment in this cause.

6. That the Indictment in this cause fails to charge defendant with a public offense for which he has not heretofore been exonerated on his prior trial in Cause No. C-9558 in this Court and the re-

sultant appeal, No. 13258 to the United States Court of Appeals for the Ninth Circuit.

Dated at Phoenix, Arizona, this 8th day of April, 1954.

PARKER & MUECKE,
/s/ By DARRELL R. PARKER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Defendant moves this Court to grant him a new trial for the following reasons and upon the following grounds:

1. The Court erred in denying defendant's Motion to Dismiss (or Quash) the Indictment herein upon grounds of *res judicata*.

2. The Court erred in denying defendant's objections to the introduction of any evidence in this cause upon grounds of *res judicata*.

3. That the Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the Government's case and renewed at the conclusion of all the evidence in the case.

4. That the Court erred in admitting the following of the Government's exhibits for the reason that the same were not relevant or competent, and

that no sufficient foundation was established for the admission of the same, to-wit:

Exhibits No. 1, No. 3, No. 4, No. 5, No. 7, No. 8, No. 9, No. 10, No. 11, No. 12, No. 13, No. 14, No. 16, No. 17 and No. 23.

5. That the Court erred in admitting in evidence the Government's Exhibits Nos. 22 and 24 for the reason that upon the status of the record at the time said exhibits were offered there was no sufficient proof of corpus delicti, and therefore no foundation for the admission of such exhibits, and that the said exhibits seriously prejudiced this defendant in the trial of the said cause.

6. That a new trial should be granted herein for the reason that the Court erred in admitting the testimony and exhibits of the witness Lloyd M. Tucker, to which objections were made.

7. That the verdict is contrary to the weight of the evidence.

8. That the verdict is not supported by substantial evidence.

9. That the Court erred in admitting any evidence in the cause and in failing to grant defendant's Motion to Dismiss (or Quash) the Indictment in said cause for the reason that all matters relating to the said Indictment were *res judicata* and had theretofore been effectively disposed of in Cause No. C-9558, and the subsequent appeal thereon No. 13258 by this Court and the United States Court of Appeals for the Ninth Circuit.

10. That the Court erred in making an order on February 25, 1954 upon request of the United

States Attorney, granting the previous Plea in Bar of this defendant to sub-sections (A) and (B) of the Bill of Particulars and assuring counsel for both sides that no evidence would be permitted under said sub-sections (A) and (B) and then subsequently vacating the said order and permitting evidence under said sub-sections of the Bill of Particulars.

11. That the Court should grant a new trial herein for the reason that on account of the rulings herein complained of, this defendant has been denied his legal and constitutional rights and has been deprived of a fair and impartial trial.

Dated at Phoenix, Arizona, this 8th day of April, 1954.

PARKER & MUECKE,
/s/ By DARRELL R. PARKER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF APRIL 12, 1954

Honorable Claude McColloch, United States District Judge, specially assigned, presiding.

This case comes on regularly for sentence this day. Robert S. Murlless, Esquire, Assistant United States Attorney, appears for the Government. The

defendant, Claude E. Spriggs, is present in person with counsel, Darrell R. Parker, Esquire.

The defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict and defendant's Motion for New Trial are now argued by counsel.

It Is Ordered that said Motion for Judgment of Acquittal Notwithstanding the Verdict and said Motion for New Trial be and they are denied. Whereupon the judgment of the court is entered as follows:

In the District Court of the United States
for the District of Arizona

No. C-10,711-Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAUDE E. SPRIGGS,

Defendant.

JUDGMENT

On this 12th day of April, 1954, at Phoenix, Arizona, came the attorney for the Government and the defendant appeared in person and by counsel Darrell R. Parker, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 26, Section 145(b), United States Code, (attempt to defeat and evade income tax) as charged.

The Court having asked the defendant whether

he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby fined in the sum of \$1,000.00.

It Is Ordered that the execution of judgment be stayed for a period of 24 hours upon the following terms and conditions: That the defendant shall within the period herein specified, pay to the clerk of this court for deposit in the registry fund, said fine in the sum of \$1,000.00, there to remain until final disposition of this case by appeal or otherwise.

/s/ CLAUDE McCOLLOCH,
United States District Judge

[Endorsed]: Filed April 12, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the United States District Court,
for the District of Arizona:

You Are Hereby Notified that Claude E. Spriggs, defendant in the above-entitled cause, residing at 730 West Coronado Road, in the City of Phoenix, County of Maricopa, State of Arizona, by his attorneys, Parker & Muecke, by Darrell R. Parker, residing at 713 West Palm Lane, in the said City of Phoenix, County of Maricopa, State of Arizona,

and having offices at 310 Luhrs Tower in the said City of Phoenix, Arizona, undersigned, hereby gives notice of appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from the verdict of the jury made and rendered herein on April 5, 1954, finding the said defendant guilty as charged in the Indictment herein, the order denying defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict entered on April 12, 1954, and the order denying defendant's Motion for New Trial entered on April 12, 1954, and the judgment rendered thereon on April 12, 1954, by the United States District Court, for the District of Arizona, imposing the following sentence, to-wit: Fine of \$1,000.00.

General Statement of Offense: The Indictment charges attempt to defeat and evade income tax for the year 1947 in violation of 26 U.S.C. 145 (b) as amplified by the Bill of Particulars. The offense charged falls into three categories:

(a) Alleged taxable gain on the sale of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona, made on August 14, 1947, \$1,698.15;

(b) Alleged taxable gain on sale of Lot 5, Eastwood Place, Phoenix, Arizona, made on November 20, 1947, \$544.64;

(c) Over-statement of depreciation on property belonging to defendant and referred to as the "Henshaw Road property", Phoenix, Arizona, in which it is alleged that depreciation was over-stated in the amount of \$2,978.60.

It is charged on the foregoing that there was

owing to the United States of America an income tax of \$1,058.03.

The present place of confinement of the said defendant is:

Dated this 12th day of April, 1954.

/s/ CLAUDE E. SPRIGGS,

Defendant

PARKER & MUECKE,

/s/ By DARRELL R. PARKER,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed April 12, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To: The Clerk of the United States District Court in and for the District of Arizona, and to the United States of America, and its attorney, Jack D. H. Hays:

The defendant herein, Claude E. Spriggs, hereby designates the following record and portions thereof, and the transcript of the proceedings and evidence adduced herein to be contained in the record on appeal, to-wit:

1. Indictment;
2. Motion by defendant to dismiss indictment (dated March 20, 1953);
3. Plea in Bar (former jeopardy);

4. Motion for Bill of Particulars;
5. Bill of Particulars (from U. S. A. vs. Claude E. Spriggs, No. C-9558 Phx.) (Copy from page 8 of printed Transcript of prior case.)
6. Order of February 25, 1954 granting in part and denying in part the plea in bar;
7. Motion to Dismiss (or Quash) Indictment (Plea of res judicata);
8. Reporter's Transcript of the Evidence;
9. All exhibits received in evidence during trial on behalf of Government and defendant (Exhibits Nos. 6, 8, 19 and 20 not admitted in evidence);
10. All exhibits received in support of Motion for dismissal of Indictment.
(Portions of Record in Cause No. C-9558 Phx.)
Exhibits:
 - A. Minutes of Court, November 15, 1951;
 - B. Indictment;
 - C. Response to Motion for Bill of Particulars;
 - D. Transcript of Record, Appeal No. 13258.
(Not to be printed but incorporated by reference to Spriggs vs. USA, No. 13258.)
 - E. Mandate of United States Court of Appeals, Ninth Circuit in Case No. 13258 and filed in Case No. C-9558 Phx.
 - F. Opinion in Cause No. 13258, Spriggs vs. U. S. A., 198 F.2d 782.
 - G. Stipulation and Order of October 15, 1952, in Cause No. C-9558.
11. All minute entries and orders of the Court made in the entire proceedings.
12. Verdict of the jury.

13. Motion for judgment of Acquittal Notwithstanding the Verdict.

14. Motion for a new trial.

15. Judgment and sentence of the Court.

16. Notice of Appeal.

17. Statement of Points on Appeal.

18. Designation of Record on Appeal.

Dated at Phoenix, Arizona, this 20th day of April, 1954.

PARKER & MUECKE,
/s/ By DARRELL R. PARKER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed April 21, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH DEFENDANT-APPELLANT RELIES ON THIS APPEAL

The points upon which the defendant-appellant relies in this appeal are as follows:

1. The District Court erred in denying defendant's "Motion to Dismiss Indictment" (dated March 20, 1953) on ground of res judicata and former jeopardy.

2. The District Court erred in failing to sustain in full defendant's "Plea in Bar" predicated upon the grounds therein stated.

3. The District Court erred in vacating its order of February 25, 1954, sustaining in part and denying in part defendant's "Plea in Bar".

4. The District Court erred in its order of March 31, 1954, denying defendant's "Motion to Dismiss Indictment" based upon grounds of *res judicata*. (Motion dated March 29, 1954.)

5. The District Court erred in overruling defendant's objection to the Government's opening statement on grounds of former jeopardy and *res judicata*.

6. The District Court erred in overruling defendant's objection to introduction of any evidence by the Government in support of the indictment for reasons of former jeopardy and *res judicata*.

7. The District Court erred in denying defendant's motion for directed verdict of acquittal at the close of the Government's case for the reasons there given.

8. The District Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of all the evidence for the reasons there given.

9. The District Court committed error prejudicial to defendant in admitting any proof by the Government of items A and B of the bill of particulars on grounds of former jeopardy and *res judicata*.

10. The District Court committed error prejudicial to defendant in admitting any proof by the Government as to the item of alleged overstatement

of depreciation on the Henshaw Road property on grounds of former jeopardy and *res judicata*.

11. The District Court erred in denying defendant's motion to dismiss indictment on grounds of *res judicata* and the provision of Rule 48 of the Federal Rules of Criminal Procedure.

12. That under Rule 48 of the Federal Criminal Rules the Stipulation and Order of dismissal of the former indictment constituted a final termination of the prosecution of this defendant on this particular charge, and re-indictment on the same offense violates said Rule 48 and established principles of *res judicata*.

13. The District Court erred in admitting into evidence Government's exhibits Nos. 22 and 24, statements of defendant for there was no sufficient independent evidence aside from defendant's own statements to sustain a conviction, and defendant's motion for judgment of acquittal made before submission of the case to the jury should have been granted.

14. For the same reasons as stated in the paragraph above, the Court erred in refusing to grant defendant's motion for judgment of acquittal notwithstanding the verdict and his motion for a new trial.

15. The District Court erred in admitting the following numbered Government exhibits for the reason that same were either irrelevant, incompetent or no proper foundation was laid for their admission into evidence and defendant was preju-

diced thereby, viz.: Nos. 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21 and 23.

Dated this 21st day of April, 1954.

PARKER & MUECKE,
/s/ By DARRELL R. PARKER,
Attorneys for Defendant
Acknowledgment of Service attached.

[Endorsed]: Filed April 21, 1954.

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

To: The Clerk of the United States District Court
for the Judicial District of Arizona, and to
Mr. Claude E. Spriggs, Defendant, and Mr.
Darrell R. Parker, Attorney at Law, Attorney
for Defendant.

Plaintiff, United States of America, hereby designates additional portions of the record, in the above-entitled matter, to be contained in the record on appeal:

1. Answer in opposition to motion to dismiss indictment (filed January 7, 1954).
2. Answer in opposition to motion for bill of particulars (filed February 8, 1954).
3. Motion of Plaintiff for re-hearing on defendant's plea in bar (filed March 12, 1954).

4. This additional designation of record.

Dated: April 30, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

[Endorsed]: Filed April 30, 1954.

[Title of District Court and Cause.]

ORDER

Good Cause appearing therefor,

It Is Ordered that the time for filing the Record on Appeal and docketing the appeal herein in the United States Court of Appeals for the Ninth Circuit be, and it is hereby, extended to and including July 11, 1954.

Dated at Phoenix, Arizona, this 14th day of May, 1954.

/s/ DAVID W. LING,
United States District Judge

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

ORDER AUTHORIZING WITHDRAWAL OF ATTORNEYS FOR DEFENDANT

Upon motion of Darrell R. Parker of the firm of Parker & Muecke for leave to withdraw as counsel

for the defendant, and the said defendant having consented in writing to such withdrawal.

Now, Therefore, It Is Hereby Ordered that the firm of Parker & Muecke, be, and they are hereby, authorized to withdraw from any further representation of the defendant in the above entitled and numbered action.

Dated this 16 day of June, 1954.

/s/ DAVID W. LING,
Judge

[Endorsed]: Filed June 16, 1954.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Claude E. Spriggs, Defendant, numbered C-10711 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies

of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, constitute the record on appeal in said case as designated in the Appellant's Designation and in the Appellee's Designation filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Indictment.
2. Defendant's Motion to Dismiss Indictment, filed March 20, 1954.
3. Plaintiff's Answer in Opposition to Defendant's Motion to Dismiss Indictment.
4. Defendant's Plea in Bar.
5. Defendant's Motion for Bill of Particulars.
6. Minute Entry of February 8, 1953 (arraignment).
7. Government's Answer in Opposition to Motion for Bill of Particulars.
8. Bill of Particulars (from United States of America vs. Claude E. Spriggs, No. C-9558 Phoenix) as shown on page 8 of printed Transcript of Record. (Note: This item is contained on page 8 of Defendant's Exhibit D in item 17 below.)
9. Minute entry of February 10, 1954 (plea of not guilty; ruling on defendant's motions).
10. Order granting Plea in Bar in part and denying Plea in Bar in part.
11. Motion of Plaintiff for Rehearing on Defendant's Plea in Bar.

12. Minute entry of March 22, 1954 (Order vacating order of February 25, 1954, pertaining to Plea in Bar).

13. Defendant's Motion to Dismiss (or Quash) Indictment filed March 29, 1954.

14. Minute entry of March 31, April 1, 2 and 5, 1954 (proceedings of trial).

15. Government's exhibits 1, to 5, 7, 9 to 18, and 21 to 24 in evidence.

16. Defendant's exhibit A in evidence.

17. Defendant's exhibits A, B, C, D, E, F and G received in support of Motion to Dismiss Indictment.

18. Verdict.

19. Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict.

20. Defendant's Motion for a New Trial.

21. Minute entry of April 12, 1954 (sentence proceedings; order denying Motion for Judgment of Acquittal and Motion for New Trial).

22. Judgment.

23. Defendant's Notice of Appeal.

24. Defendant's Designation of Record on Appeal.

25. Defendant's Statement of Points Upon Which Defendant-Appellant Relies on Appeal.

26. Plaintiff's Designation of Additional Portions of Record on Appeal.

27. Order extending time to docket appeal to July 11, 1954.

28. Reporter's Transcript.

29. Order Authorizing Withdrawal of Attorneys
for Defendant.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$4.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 28th day of June, 1954.

[Seal] /s/ WM. H. LOVELESS, Clerk

In the District Court of the United States
for the District of Arizona

No. C-10711-Phx.

UNITED STATES GOVERNMENT,

Plaintiff,

vs.

CLAUDE E. SPRIGGS,

Defendant.

REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly to be heard in the above entitled court before the Honorable Claude McColloch, presiding with a jury, commencing at the hour of 12:55 o'clock p.m., on the 31st day of March, 1954.

The plaintiff was represented by Robert Murlless, Assistant United States Attorney.

The defendant was present and represented by Darrell R. Parker, attorney at law, Phoenix, Ariz.

Thereupon the following proceedings were had:

The Clerk: Number C-10711, Phoenix, the United States of America, plaintiff, versus Claude E. Spriggs, defendant, for trial.

Harold T. Shortridge was sworn in as official reporter. [1*]

Thereupon the following proceedings were had:

Mr. Parker: At this time I think I should be a bit derelict in my duty if I did not call the fact that there has been a motion predicated upon the doctrine of res judicata here and not disposed of. On the basis of the matters therein set forth and the general rule of res judicata I object at this time to counsel's statement or to any proceeding under in this indictment on the ground that that the whole or a substantial portion of this indictment has heretofore been adjudicated.

The Court: I reserve a decision until the later statements of the case.

Mr. Murlless: Counsel and ladies and gentlemen: At this point in the trial the prosecution—it becomes appropriate since time immemorial that the lawyer that has affirmative of the case have an opportunity to state what the evidence is to the jury, but to state what he, also, believes the Government's case or the case that is about to be proven; what he expects that it will prove in the case. And it is for this purpose principally and that it may help the jury early in the hearing of the testimony to organize it. It may give them a

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

framework upon which to better judge it, and it is in this spirit solely I'd like to state to you what I expect that the Government's [2] case will prove. I am not stating what the facts are; they come to you solely from the witness chair. But in this case, the United States of America versus Claude E. Spriggs, the Government expects to prove an attempt to evade income tax for 1947; that the attempt was three-fold, and that with respect to two of the items they are classified, and the Government expects to prove that they were items of unreported income. The Government expects to prove unreported income from taxable gains situation, the sales of capital assets; that two of the items about which evidence will be offered here are of that variety. The Government expects to satisfactorily prove that in September of '47 a piece of property at 2520 North Third Street was purchased from this taxpayer from Mrs. Katherine Moss Fisher for approximately \$2,000; that he had certain other costs in connection with that property, but that within three or four months, in 1947 again, he sold the property for some \$2,750, with an item of added cost, but with a taxable gain, a net profit and a taxable gain, of \$450, which with intent to evade the proper amount of his tax for the year 1947 he didn't report in his income tax return for that year; that of that same class and with respect to that [3] same kind of a transaction, the Government expects to prove that with respect to a piece of property purchased by the defendant, Claude E. Spriggs, sometime early in 1945, located

at 1417 to 25 East Washington Street, he purchased from a man by the name of Eglar for some \$5,500; that in, on August 14, or thereabouts in 1947, he sold that piece of property to some people by the name of Arreola for some \$8,500; that on August 14, 1947. The Government expects to prove that there was a profit to him in that regard of a long term nature in excess of \$3,300, and one half thereof was a taxable gain, and that with intent to deprive the Government of the fair amount of tax upon his income for that year, and that part of it, the defendant, Claude E. Spriggs, failed to put that second taxable gain into his income tax return for the year 1947. The Government expects to prove the third of these items to be an overstatement of depreciation. The Government expects to prove that the defendant was in two businesses at least; that of practicing law, and that of the ownership of real property for lease and that in connection with his business is the owner of rental property, he was authorized in his tax return to take certain sums as expenses of operation, known more particularly and technically as depreciation, and that he takes that upon the basis of what it, the cost of the improvements, that he holds for rental purposes are; but this defendant in his tax return of 1947 over-stated the cost to him of certain, a certain piece of property in a sum in excess of \$20,000, approximately, as much again as its actual cost to him with the intent and for the purpose of reducing the gross or the gross profit from that business, deducting that as an expense to the

end that some \$4,000 in depreciation was taken when something approximating \$2,900 should have been taken. Now, when this on so many facts \$2900. should have been taken. These things the Government expects to prove. At the end of that time, after you have given it your conscientious consideration, in view of the oath you have taken, the Government will ask you to bring in a verdict of guilty in this regard against the defendant, Claude E. Spriggs.

Mr. Parker: Upon Mr. Murlless's opening statement I move your Honor to declare a mistrial for the reason that the Fisher and Eglar transactions are both matters upon which adjudications have previously been had favorable to this defendant. I separately make the same motion upon the same [5] ground with respect to the depreciation item and then independently, your Honor, I move that the Court instruct the Jury now to return a verdict of acquittal for the defendant upon the ground that the plaintiff's opening statement—I mean the Government's opening statement—as announced by Mr. Murlless does not contain the essential elements of a *prima facie* case.

The Court: Motion denied. Do you wish to make your statement?

Mr. Parker: We waive our statement.

The Court: Put on your first witness.

Mr. Murlless: Mr. William McRae.

WILLIAM McRAE

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Mr. Parker: If your Honor please, at this point defendant objects to the introduction of any evidence in support of this indictment upon the grounds set forth in the motion to dismiss the indictment on account of prior adjudication.

The Court: Objection overruled.

Direct Examination

Q. (By Mr. Murlless): State your name. [6]

A. William McRae.

Q. What is your work, sir?

A. I am Assistant District Director of the Internal Revenue Office, Phoenix, for the District of Arizona.

Q. With respect to the State of Arizona, what is the collection district of Arizona?

A. The entire State of Arizona is involved in this District.

Q. And for how long has that been your work?

A. More than 20 years.

Q. And for how long have you lived in the city of Phoenix?

A. About 29 years.

Q. And in your official capacity as Assistant Director in the District of Arizona, did you have occasion in connection with this case to be subpoenaed to bring certain official records of the Office of the Director of Internal Revenue for the District of Arizona?

A. I did.

(Testimony of William McRae.)

Q. And what are those records in a general way, if you will tell the jury.

A. I have been subpoenaed to bring the income tax return filed by Claude E. Spriggs for the years 1946, 1947, 1948 and 1949 and 1950. [7]

Q. And each of those returns that you have brought are, do they appear to, on their face, to be a return of the, a resident of the District of Arizona? A. They do.

Q. Officially to be lodged in the Director's Office here? A. Yes.

Q. And you are custodian of those official records? A. Yes.

Q. Would you hand me Federal Income Tax return for 1946, please? May this be marked, if your Honor please, for identification?

(Whereupon the document was marked as Government's Exhibit 1 for identification.)

Mr. Murlless: I hand to you, Mr. McRae, Government's 1 for identification and ask you if that is the first return about which you speak, an official document of the Director of the Internal Revenue for the District of Arizona? A. Yes.

Q. With reference to a man by the name of Claude E. Spriggs? A. It is.

Q. And will you hand me the second of the [8] documents about which you have just testified. May this document be marked for identification, if your Honor please.

(Whereupon the document was marked as Government's Exhibit 2 for identification.)

(Testimony of William McRae.)

Mr. Murlless: I hand you Government's 2 for identification, Mr. McRae, and ask you, generally, what that is?

A. Income tax return filed by Claude E. Spriggs on form 1040 for the year 1947.

Q. Now, would you hand me the third of the documents about which you have just—may this be marked, if your Honor please, Government's 3 for identification.

(Whereupon the document was marked as Government's 3 for identification.)

Mr. Murlless: I hand you Government's 3 for identification, Mr. McRae, and ask you, generally, what that is.

A. It is the income tax return filed by Claude E. Spriggs for the year 1948 on Form 1040.

Q. And would you give me the fourth of the documents which you stated that you brought to the Court?

A. May I comment that there is also an **amended** return attached to the '48. [9]

Q. I see; and they were all identified there as Government's 3 for identification, is that the condition? A. Yes.

Q. Very well, sir. Now, each of those three exhibits, Government's 1, 2 and 3 for identification, is an official Governmental record in the office of the Director of the Internal Revenue, the custody of them being appropriately in you as you are Assistant for the purpose of this trial?

A. That is right.

(Testimony of William McRae.)

Q. Now, would you take Government's Exhibit 1 for identification and—you hold it, if you will, Mr. McRae—may that be stricken. Government's 2 for identification. What is the name of the taxpayer there, Mr. McRae?

A. Claude E. Spriggs.

Q. Does it show an address?

A. The address is 730 West Coronado Road, Phoenix, Maricopa County, Arizona.

Q. It appears to be an address within the collection district of Arizona?

A. That is correct.

Q. And by whom is it signed?

A. Claude E. Spriggs.

Q. And this is the return, the official [10] record which you have stated comes into your custody and your capacity as Assistant to the Director of Internal Revenue for Arizona?

A. That is right.

Q. Move its admission in evidence, if your Honor please.

(Thereupon the document was handed to counsel for defendant.)

Mr. Parker: I object to it, your Honor, on the ground that the matter has already been adjudicated.

The Court: Admitted. Number 2 received.

Mr. Murlless: I hand you Government's 2 in evidence, Mr. McRae; will you state to the jury if it is reflected there upon what basis was Claude E. Spriggs the taxpayer?

(Testimony of William McRae.)

Mr. Parker: If your Honor please, the exhibit speaks for itself.

The Court: You may answer.

A. The tax return discloses income from certain sources as stated in the return.

Q. For what years? A. Year 1947.

Q. Calendar, or fiscal? A. Calendar.

Q. And will you state to the jury the source [11] of the income reflected there?

A. It was from two sources—rent on houses, and fees from the practice of law.

Q. And to aggregate adjusted gross income of how much?

A. From rentals, \$11,471.30, and from the practice of law, \$1,753.72.

Q. From the 11, the excess of \$11,000, which you state is the aggregate of the return from the business of rental of houses, to what net profit did the business of rental of houses go as reflected by that return?

A. The return discloses net return at that time is \$2,133.74.

Q. The aggregate was reduced from \$11,000 to \$2,000 some? A. Yes.

Q. What were the items to reduce it to that degree?

Mr. Parker: Perhaps I am in error, but I'm unfamiliar with the procedure by which a witness explains his version and interpretation of an exhibit in evidence, and I again object to this line of questioning.

(Testimony of William McRae.)

The Court: You may continue.

A. Depreciation. \$5,445.50. Repairs \$1,520.11.
Other expenses \$2,154.95.

Q. Now, there was another source of income about which you stated, the income from the practice of law, did you state? A. Yes.

Q. What is the aggregate of that?

A. \$1,753.72.

Q. And the net, if you will, please?

A. \$467.58.

Q. From the face of the return will you state to the jury whether any tax was paid?

A. No tax was paid on the return.

Q. Thank you, very much, sir. Your witness.

Cross Examination

Q. (By Mr. Parker): No questions, Mr. McRae.

Mr. Murlless: We'll need this witness at a later time, but for the time could he be excused?

The Court: Yes.

KATHARINE MOSS FISHER

was called as a witness on behalf of the Government, and being first duly sworn testified as follows: [13]

Direct Examination

Q. (By Mr. Murlless): Will you state your name, please?

A. Mrs. Katharine Moss Fisher.

Mr. Parker: I must object to any testimony from this witness on the ground that the indict-

(Testimony of Katharine Moss Fisher.)

ment is a matter upon which the defendant has heretofore been acquitted.

The Court: You may testify.

Mr. Murlless: You may testify.

A. Katharine Moss Fisher.

Q. And where do you live?

A. 334 East Verde Lane.

Q. Phoenix? A. Yes.

Q. And for how long have you lived in Arizona? A. Thirty years.

Q. Then you did live here in 1945, '47?

A. Yes, sir.

Q. Do you know the defendant, Claude E. Spriggs, that sits to the table behind me to the right side? A. Yes.

Q. You do know Mr. Spriggs? A. Yes.

Q. In what connection were you, did you make his acquaintance? [14]

A. He bought a lot from me.

Q. And will you state to the jury the location of that lot, generally, if you can, or its address, or however you identify it.

A. It's on North Third Street. It's north of the, Ashland, along the alley. It's Eastwood Place. I don't know legally. It's 2526 North Third.

Q. About what time did you make this sale to Mr. Spriggs about which you have just spoken?

A. Well, within one day, I know, because I checked my bank records of September 22, 1947.

Q. And what, generally, was the condition of this lot at that time; was it improved, or vacant?

(Testimony of Katharine Moss Fisher.)

A. Vacant.

Q. Vacant? A. Unimproved.

Q. Where did you meet Mr. Spriggs?

A. When I met him down town at the title company.

Q. For the purpose——?

A. To finish the business on selling the lot.

Q. How much did he pay you for that lot?

A. \$2,000.

Q. And that was on or about the 22nd day of [15] September? A. 1947.

Q. Do you at this time have a memorandum or anything concerning that transaction, Mam?

A. No.

Q. How do you make a recollection of the amount of \$2,000, if you will tell the jury.

A. Well, I didn't have it and I had to call the bank and ask them to search my deposit records, and I went through the drawers until I found the slips and notice and I checked it with the bank.

Q. Thank you very much. Your witness.

Cross Examination

Q. (By Mr. Parker): Mrs. Fisher, did I understand that you have resided in Arizona for 30 years? A. Correct.

Q. And how long have you resided in Phoenix?

A. Same length of time.

Q. Same length of time; then you were in Phoenix during the entire year of 1951; at the time that this case was formerly tried you were in

(Testimony of Katharine Moss Fisher.)

Phoenix at that time, were you not? I'll make it more specific: were you in Phoenix on the 14th day of November, 1951, to the best of your recollection?

A. Not one—November, 1951; I may have been visiting in Texas.

Q. You may have been visiting in Texas? Did you visit in Texas during the month of November, 1951, to your positive recollection? What I'm getting at, Mrs. Fisher, I want, I don't want to mystify you, I just want to get the particulars——

Mr. Murlless: Object to any questions. I don't know what he's trying to get at, but if it's what I think, it is irrelevant, immaterial and inconsequential.

The Court: Overruled.

Mr. Parker: At the question of whether or not you were here in Phoenix available to the Government when this case was tried before, and as I have already pointed out to you, the trial according to the record I have here, began on the 14th day of November, 1951. Were you here at that time?

A. I have told you to the best of my ability I think I was visiting in Texas.

The Court: Do you remember the trial of this man before? Did you ever hear——?

A. Last year the only time it's ever come to my attention when a paper was served.

The Court: That's not the early part of '51.

Mr. Parker: You weren't subpoenaed?

A. No, last year.

Q. When you, were you first contacted by some-

(Testimony of Katharine Moss Fisher.)

one in the Internal Revenue Department concerning Mr. Spriggs—how long ago, or how many years ago?

Mr. Murlless: To which we make the same objection.

The Court: Overruled.

A. Within the last year and a half I was served to be at that in Tucson, but my mother had broken her hip and I couldn't go.

Q. This wasn't in Tucson. You are referring to a certain Grand Jury. I see. You weren't subpoenaed or contacted by the Government prior to November 14, 1951?

The Court: No, she said a year and a half ago.

A. I would have known the case if I had.

Q. In connection with the sale of this vacant lot is it not a fact that you did not pay any of the costs or expenses or escrow fees or anything of that sort in connection with that transaction?

A. That's a true statement.

Q. You didn't pay any? [18]

A. I did not.

Q. That's all.

Mr. Murlless: Thank you very much, Mam. Could this witness be excused, if your Honor please?

The Court: Yes.

H. M. VAN DENBURGH

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Murlless): Will you pronounce your name? A. H. M. Van Denburgh.

Q. What is your work? A. Lawyer.

Q. And without——

Mr. Parker: Excuse me. The same objection to the testimony.

The Court: Same ruling.

Q. And do you live in the city of Phoenix?

A. Yes.

Q. How long have you lived here?

A. About 35 years.

Q. Know the defendant, Claude E. Spriggs?

A. Yes.

Q. And in what connection? [19]

A. I know him as a lawyer; in addition to that I bought a lot.

Q. When did you buy that lot, sir?

A. Went into escrow October 30, 1947.

Q. And would you—do you have papers that show the legal description of the lot?

A. Lot 6 and the south four feet of lot 5, Eastwood Place, except the east ten thereof.

Q. Do you recall its approximate address?

A. Yes.

Q. Will you state it to the jury——

A. It's on the west side of Third Street half a block south of Virginia on the Alley and I think

(Testimony of H. M. Van Denburgh.)

the street, first street, south of Virginia parallels Ashland, so it would be a half a block south of Ashland and Virginia.

Q. Could you fix an approximate street number?

A. 2500 and—I don't have that street number.

Q. Do you know whether or not it is the same lot about which Mrs. Fisher was testifying?

A. Yes.

Q. Now, you were requested to bring papers in this regard. A. Yes.

Q. Do you have any that you could—— [20]

A. Yes, I have the escrow instructions under which the lot was purchased. Issued by the title company.

Q. May I have those for the purpose of evidence in this case? I hadn't gotten to talk to you before, sir. A. Yes.

Q. May this be marked for identification, if your Honor please.

(Whereupon the documents were marked as Government's Exhibit 4 for identification.)

Q. I hand you Government's Exhibit 4 for identification, Mr. Van Denburgh, and ask you what that is?

A. These are what is commonly known as escrow instructions, signed by Mr. and Mrs. Spriggs and by me at the office of the Arizona Title Guarantee and Trust Company and at the time I purchased that lot.

Q. And that was sometime——

A. October 30, 1947.

(Testimony of H. M. Van Denburgh.)

Q. And were you present when the signatures of Mr. Spriggs was placed upon it? A. Yes.

Q. And that of his wife? A. Yes. [21]

Q. And this is the transaction with respect to which you have just testified concerning a lot at 2526 North Third Street in Phoenix, Arizona?

A. If that's the correct number. I believe it is.

Q. All right, sir; it's somewhere out there north of Virginia on——

A. South of Virginia on the alley on the west side of Third Street.

Q. And this Government's 4 which you have just given to me represents escrow instructions with respect to that transaction? A. Yes.

Q. Move its admission in evidence as Government's 4 for, in evidence.

Mr. Parker: The only objection is the general objection of previous adjudication.

The Court: Admitted.

Mr. Murlless: I hand you Government's 4 again, Mr. Van Denburgh, and ask you for the lot which is described there, and would you state what its legal description is again, please?

A. Lot 6 and the south 4 feet of lot 5, Eastwood Place, except the east ten feet thereof.

Q. With respect to that lot, how much were you paid in that transaction? Rather you paid?

A. I paid \$2,750.

Q. Can you tell from Government's 4 in evidence how much of that \$2,750 Mr. Spriggs received; can you tell that?

(Testimony of H. M. Van Denburgh.)

A. He received it all except, well, eleven—I paid one twentieth of the 1947 taxes and Mr. Spriggs paid eleven twentieths. He paid the usual title charges.

Q. And it doesn't show exactly what they were?

A. No.

Q. Thank you very much. In that connection, sir, the records of instructions, being Government's 4 in evidence, did you receive anything more that could be characterized as consideration for your \$2,750 other than——

A. No, sir; Mr. Spriggs had plans drawn which, or by an architect to build some rental units on the property and he delivered those to me at the time I purchased the lot from him.

Q. And did you receive anything else that could be characterized as consideration for that sum of money?

A. No.

Q. Thank you very much. Your witness. [23]

Cross Examination

Q. (By Mr. Parker): Mr. Van Denburgh, you are a lawyer?

A. Yes.

Q. And you have been a member of the bar of the State of Arizona for how many years?

A. Thirteen.

Q. And you are also engaged, are you not, in some real estate activities?

A. No; no, my wife is a real estate broker—I have never engaged myself in it.

(Testimony of H. M. Van Denburgh.)

Q. You have practiced law and she deals in real estate?
A. Well, yes.

Q. Well, now, you were in Phoenix; you have been in Phoenix continuously, have you not, for the past ten or more years?

A. With the exception possibly of a summer vacation. That's right.

Q. I think that's all. You were also called, weren't you, sir, at that time, weren't you?

A. I don't understand that.

Q. You were subpoenaed?

A. Which time?

Q. The prior time about which he's asked these other witnesses.

A. I think; yes, I testified before the petit jury and I think I have been before the Grand Jury [24] twice.

Q. And one other thing, if I might go back, if your Honor please; that lot, what was its condition when you purchased it?

A. Vacant lot.

Mr. Parker: I object as improper redirect.

The Court: Answer.

Q. Very well, sir. Thank you very much. May this witness, too, be excused, if your Honor please?
Mr. Jacob Eglar.

(The witness being duly paged did not answer.)

Mr. Murlless: Mr. Joseph Cohen.

JOSEPH COHEN

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Murlless): Again, sir, may I trouble you—— A. Joseph Cohen.

Q. Where do you live?

A. 6111 North Seventeenth Avenue.

Q. What is your work? A. Real estate.

Q. How long have you lived in Phoenix? [25]

A. Twenty years.

Q. And that's Phoenix address—6111 East Seventeenth Avenue? A. Yes, sir.

Q. And you have lived in Phoenix 20 years?

A. Yes.

Q. What is your work? A. Real estate.

Q. What was your work in 1945?

A. Real estate.

Q. Do you know the defendant, Claude E. Spriggs? A. Yes, sir.

Q. And in what connection do you know him?

A. By selling him a piece of property.

Q. And what was the general nature of that property; what kind of property was it?

A. It was on Washington on the 1400 block about several cottages; it was very old ones. 1400 East Washington, yes.

Q. Was it your own?

A. No, somebody else.

Q. Who? A. Jacob Eglar.

Mr. Parker: I want to object on the ground

(Testimony of Joseph Cohen.)

that this testimony clearly applies to a matter [26] upon which the defendant has been exonerated on trial in court.

The Court: You may answer—continue.

Q. Jacob Eglar; was the answer that?

A. Yes.

Q. Where do you live, or he live, at that time?

A. Jacob Eglar?

Q. Yes.

A. A business on east Van Buren.

Q. Was he well or sick?

A. Pretty sick.

Q. Sick man at that time? A. Yes, sir.

Q. Do you know where he lives now?

A. I don't know where he lives now.

Q. Now, in this connection, what part did you take in this transaction?

A. I was a salesman.

Q. Salesman? A. Yes, sir.

Q. Who came to you in its regard first?

A. Jacob Eglar came to the office. A Mr. Oldakers, he was the broker.

Q. Where?

A. First National Bank Building.

Q. And about when did Mr. Spriggs come there, [27] if you can recall.

A. Of the year of 1945.

Mr. Parker: If I understand him he didn't testify that Mr. Spriggs testified that.

A. I didn't say that.

Mr. Murlless: The question was, "When did he

(Testimony of Joseph Cohen.)

come there?" Will you state what happened and how you first met Mr. Claude Spriggs?

A. Mr. Jacob Eglar came into the office to sell a piece of property for the price of \$6,000 and they took his listing and put an ad in the paper and the office received a call from Mr. Spriggs and I went up to his office; I could recall it right, and I made a deal with him of \$5,500, a cash deal.

Q. And did you have occasion to go with him to the title company at a later time?

A. I believe when he came to sign the papers and pay the final, finally, I believe I met him there.

Q. Well, then, finally he did come to the office of Mr. Oldaker?

A. No; the title company.

Q. What was the nature of that; would you describe it generally for the jury, the nature of the property? [28]

A. As I say, it was a lot and very old cottages, occupied by some and some vacant.

Q. You stated the address?

A. In the 1400 block, East Washington, on the south side of the street.

Q. Have you had occasion to search the records in this regard subsequent to this happening?

A. I did.

Q. Will you state what the legal description of that property is, if you know?

A. It is lot 7 and 8 and block 15, Collins Addition.

Q. Is that an addition to the city of Phoenix?

(Testimony of Joseph Cohen.)

A. Yes.

Q. You say that Mr. Eglar was sick at that time?

A. He wasn't sick in bed, but he was an old and sick man.

Q. As I understand it you took care of all of the money transactions.

A. The title company did; I took the first deposit of \$1,000 and made it out to the title company and the deal went through and Spriggs made a check of \$4,500 to cover.

Q. Were you there when the escrow was closed?

A. Yes. [29]

Q. And you observed the payment of that piece of property of \$1,000 and \$4,500?

A. That's right.

Q. And you have the memo or contract or copy of it?

A. The memo and contract were all the papers to Mr. Oldaker—he was real estate man and he kept it and I don't know whether he is alive or not.

Q. All right, sir. Your witness.

Cross Examination

Q. (By Mr. Parker): Mr. Cohen, have you ever previously testified concerning this matter in a case between the Government and Mr. Spriggs?

A. Yes, sir; the Grand Jury in Tucson.

Q. I mean a trial? A. No, sir.

Q. You weren't called on a previous trial in this case? A. No, sir.

(Testimony of Joseph Cohen.)

Q. Were you in Phoenix?

A. A year, 1951, yes, sir.

Q. Where were you living at that time?

A. 911 North Second Street.

Q. Where do you live now? [30]

A. At 6111 North Seventeenth Avenue.

Q. Are you still in the real estate business?

A. Yes, sir.

Q. Who are you with now?

A. Operating my own business.

Q. How long have you been operating your own business? A. 1941 started.

Q. You have been operating your own business for the past 12 years or more? A. Yes, sir.

Q. What is your business called?

A. No name; just my own few businesses, pieces of property.

Q. I see. Were you subpoenaed for the previous trial in this case back in November, 1951?

A. Never was.

Q. Now, Mr. Cohen, did I understand you to say at that time you went more than once to the title company in the presence and with Mr. Spriggs? A. No, sir; only once.

Q. Just one time? A. That's right.

Q. And isn't it a fact that at the time you went to the title company and its escrow department with Mr. Spriggs the one and only time you went [31] was when the escrow was opened up, not when it was closed?

(Testimony of Joseph Cohen.)

A. I believe the opposite; I can't recall. I think at the closing.

Q. You are quite sure it was?

A. No; it was nine years ago.

Q. It's quite awhile ago, but you think at the closing?

A. I think it was at the closing. Yes.

Q. Now, as I understand, or understood you awhile ago, you said that Mr. Spriggs paid a down payment, if I understand you, into escrow, a thousand dollars?

A. Yes.

Q. And then when the thing was closed he paid \$4,500?

A. That's right.

Q. Did both of those go through your hands?

A. No; one; the other went through the title company.

Q. The other not through you? A. No.

Q. But the first was? A. Yes.

Q. Was that check of Spriggs delivered by you to the escrow or title company? [32]

A. Yes, with the papers.

Q. Isn't it a fact that you delivered that thousand dollar check, that first check, at the time the escrow was opened?

A. I don't understand it.

Q. At the time it was first set up?

A. That's right.

Q. Yes, that's the time you delivered that thousand dollars and that's the time you went to the title company with Mr. Spriggs, isn't it?

(Testimony of Joseph Cohen.)

A. This I don't remember, whether I went or alone, but at the closing I am sure I was there.

Q. Are you sure you were just there once?

A. I think with Mr. Spriggs once.

Q. As a matter of fact you only went there just one time, didn't you?

A. That's what I think.

Q. So it couldn't be at both the opening and closing of the escrow? A. No.

Q. Now, you stated that the property that was involved here was, I don't recall your words, very old property? A. That's right.

Q. What was it, a dwelling house?

A. It was 8 or 9 cottages, very run down [33] condition.

Q. Well, now, wouldn't—cabins or shacks?

A. Cabins; a better word would be shacks.

Q. A bunch of shacks? A. That's right.

Q. And they were very run down, in a terrible state of disrepair?

A. They were; people lived there.

Q. Well, out in that area some people live in almost anything, don't they? A. Sure.

Q. And they were in bad shape?

A. They were in bad shape, that's right.

Q. That's all.

Redirect Examination

Q. (By Mr. Murlless): I'm not sure that you were understanding, Mr. Cohen; was it your statement that there were two different payments that

(Testimony of Joseph Cohen.)

were made, one of them a thousand dollars and one for \$4,000? A. \$4,500.

Q. Yes, sir; with respect to the first one, was your statement it went into your hands and was delivered to the title company?

A. Yes, sir. [34]

Q. Now, do I understand you were present when the \$4,500 payment was made?

A. To the title company.

Q. You were there with Mr. Spriggs—when you said you were there only once?

A. Spriggs?

Q. You mean with Mr. Spriggs?

A. Yes, sir.

Q. May this witness, too, be excused?

(A short recess was taken at 2:27 o'clock p.m.)

After recess, all parties as heretofore noted by the Clerk's record being present, the trial was resumed as follows:

Mr. Murlless: Mrs. Carlotta Arreola. Your Honor, it appears this lady will need an interpreter; although she understand English she has difficulty in speaking it.

(Thereupon Mr. Dwayne Rogers was sworn in as official interpreter of the Court.)

CARLOTTA ARREOLA

called as a witness on behalf of the Government, and being first duly sworn through an official interpreter, testified as follows: [35]

Direct Examination

Q. (By Mr. Murlless): If your Honor please, we have some three witnesses we won't be able to use this afternoon. Might they be excused—Mr. Fageburg, Mr. Struckmeyer, Mrs. Ross.

The Court: They are directed to be in Court at one o'clock tomorrow afternoon.

Mr. Murlless: What is your name, please?

A. Carlotta G. Arreola.

Q. And where do you live, Mrs. Arreola?

A. In Phoenix.

Q. For how long have you lived here?

A. Twenty years.

Q. And what is your husband's name?

A. Jesus Arreola.

Q. And do you know the defendant, Claude E. Spriggs, who sits behind me on the right hand side of the table? A. No.

Q. Do you know him, of him, the name Spriggs?

A. Yes.

Q. And in what connection, do you know that name?

Mr. Parker: I object to that as immaterial.

The Court: How does she know the name?

A. Because my husband and I bought a piece [36] of property from him.

Q. And about when was that—what year?

(Testimony of Carlotta Arreola.)

A. In 1947.

Q. And what month, if she can tell?

A. In August of 1947.

Q. In August of 1947. Where was the property located?

A. The lot is situated in the fifteenth block; it is block number 7 and 8 and she gave me the name of it but I couldn't understand it.

Q. What is the street address?

A. East Washington.

Q. East Washington Street?

A. Yes, sir, he is.

Q. About where would it be?

A. 1400. 1423 Washington.

Q. You state that the sale was made to you and to your husband? A. Yes.

Q. And your husband was served with a subpoena in this case, was he not, Mam?

A. Yes.

Q. And where is he?

A. He's in Nogales, Sonora.

Q. In Mexico; in the Republic of Mexico?

A. Yes. [37]

Q. And will you state why you came and your husband did not come.

A. Because he was busy and I had all the papers in California; I come from California.

Q. And do you know about this monetary transaction in connection with that property?

A. Yes.

Q. And did you bring certain papers with you?

(Testimony of Carlotta Arreola.)

A. Yes.

Q. Would you take them out, please?

Mr. Parker: While that's being done I wish to renew the same objections as before.

The Court: Same ruling.

Mr. Murlless: Now, from the papers you have there, can you tell the jury what is the legal description of the property.

A. Blocks 7, 8, Collins Addition.

Q. What is it you're reading from, Mam?

A. It's the script or writing from the buying and selling of—

Q. This property? A. Yes.

Q. Does it also state at the top "escrow instructions?" A. Yes.

Q. Could I take them from you—could I have [38] them for evidence here in Court? May this be marked for identification, if your Honor please?

(Whereupon the documents were marked as Government's Exhibit 5 for Identification.)

Mr. Murlless: I hand you Government's 5 for identification and ask you if that is the escrow instructions with respect to your purchase of this property in Collins Addition from Mr. C. E. Spriggs? A. Yes.

Q. What date?

A. The 14th of August.

Q. 1947? A. Yes, sir.

Q. Move its admission in evidence, if your Honor please.

(Testimony of Carlotta Arreola.)

(Thereupon the document was handed to counsel for the defendant.)

Mr. Parker: I object to it; there's no proper foundation laid. No showing that this was ever executed by the defendant or any of the other sellers named on the face of the sheet. I don't think it's properly admissible into evidence at this time.

The Court: Denied. [39]

Mr. Murlless: Will you state the circumstances under which you understood the money transaction and your husband did not in this regard.

Mr. Parker: I don't understand that question.

The Court: You may answer it.

A. We bought it from a real estate. It was a real estate company that made us the sale.

Q. And you supervised the money, is that the case?

Mr. Parker: I object to that as leading and suggestive.

The Court: Overruled.

A. Yes.

Q. Very well; I hand you Government's Exhibit 5 in evidence and ask you how much did you pay for the property that's represented there?

A. \$8,500.

Q. And how was that paid, if you know?

A. The first payment was \$4,000.

Q. And to whom was it made?

A. My husband paid it to the real estate who made the sale.

Q. Was it in cash or how was it?

(Testimony of Carlotta Arreola.)

A. When my husband made the deal I wasn't present, but I believe it, he did it by check.

Q. And how was the other \$4,500 paid? [40]

A. We paid it to the Valley Bank.

Q. Do you know, was it under a mortgage in that connection? A. Yes.

Q. And for how much was the mortgage?

A. \$4,500.

Q. And do you have a copy of that mortgage, Mam? A. I think it's this (indicating).

Q. You have handed me another document. May it be marked for identification, if your Honor please?

(Whereupon the documents were marked as Government's 6 for identification.)

Mr. Murlless: I hand you Government's 6, which is the last document you have handed me, Mrs. Arreola, and ask you, what is that?

A. It's a mortgage.

Q. Now, would you read the face of it to her. I—It reads "Satisfaction of Mortgage." It's not the mortgage, but is a satisfaction of mortgage, is that right? A. Yes.

Q. Is it the mortgage with respect to which you have just testified? A. Yes. [41]

Q. Among your papers may I look to see if there is a copy of the mortgage (handed to counsel). Do you have any other papers you have presented here to me with a third paper? Is it headed "Closing Escrow Instructions?" A. Yes.

(Testimony of Carlotta Arreola.)

Q. Thank you; may this be marked for identification, if your Honor please?

(Whereupon the document was marked as Government's Exhibit 7 for identification.)

Mr. Murlless: I hand you Government's Exhibit 7 for identification and ask you what that is. Does it refer to the property that you have just testified about? A. Yes.

Q. Will you examine it, Mam, so that you are satisfied that it does refer to that same deal. May it be read to her, if your Honor please, if there is a understanding.

The Court: If she says it refers to it.

A. Yes, sir.

Q. And this is a part of the same transaction and represents the escrow instructions at the time you purchased the land from Mr. Spriggs? [42] A part of the same transaction about which you have testified of an aggregate of \$8,500, a sale of property to you from Mr. Spriggs? A. Yes.

Q. Submitted for evidence, if your Honor please.

(Thereupon the document was handed to counsel for the defendant.)

Mr. Parker: If your Honor please, I object to this on the grounds there is no proper foundation laid for it.

The Court: Admitted.

(Whereupon the document was marked as Government's Exhibit 7 in Evidence.)

Mr. Murlless: Have you paid off the obligation with respect to that transaction? A. Yes.

(Testimony of Carlotta Arreola.)

Q. And about when was that accomplished, if you know? A. What?

Q. The completion of the payment of the mortgage.

A. I paid the bank in—this is the payment I made and it reads like this—“This man is the one who paid it.”

Q. That man's name being Harry C. Hatcher?

A. He paid it.

Q. He made the last payment? A. Yes.

Q. Now, how was that done?

A. Between my husband and this man, because we couldn't—this man paid the balance that we had in the bank.

Q. And you made a new mortgage to him?

A. Yes.

Q. To Mr. Harry C. Hatcher?

A. Yes.

Q. And is that the note that you gave him?

A. Yes.

Q. For the money that he paid to Mr. Spriggs on the other transaction.

Mr. Parker: There is no evidence that Mr. Hatcher or these people paid any money to Spriggs and I object to counsel's form of the question.

The Court: You may answer the question.

A. This man did all the arranging of the deal and he sent us this paper.

Q. Very well.

Mr. Parker: May I inquire if the paper being

(Testimony of Carlotta Arreola.)

referred to, if this paper was marked for identification.

Mr. Murlless: Sorry, it wasn't. May this be [44] marked for identification if it will serve your purpose.

(Whereupon the document was marked as Government's 8 for identification.)

Mr. Murlless: Now, I don't know if we wish to go further, but with respect to Government's Exhibit 8, is that the paper you refer to as being signed by you, a note to Mr. Harry C. Hatcher?

A. Yes.

Q. If that will serve counsel any purpose, if your Honor please.

The Court: He wants to see it.

(Thereupon the document was handed to counsel.)

Mr. Murlless: At the time that you bought the property, Collins Addition property?

A. Yes.

Q. Of what did it consist; what was there?

A. The buildings in——

Q. ——Yes.

A. ——five small wooden houses.

Q. And what else, if anything?

A. There wasn't anything else—one garage.

Q. And of what construction was it?

A. Wood.

Q. How big were the houses to the best of your [45] ability?

(Testimony of Carlotta Arreola.)

A. They are very small and have one room and a small kitchen.

Q. Only one room and a small kitchen; was that——

A. There was another house a little bit larger than that with three rooms.

Q. Did it have a bedroom?

A. Yes; the large one did.

Q. And a bathroom? A. Yes.

Q. How many of them had baths?

A. All of them.

Q. And of what did the bathroom consist?

A. Latrine and everything that the bathroom usually has.

Q. A tub? A. Yes.

Q. Some of them were two rooms and there was one of them that was three rooms, is that correct?

A. There is only one that had, has three rooms.

Q. And the other four, how many rooms did they have?

A. One room, the kitchen and a porch.

Q. Did you buy them furnished?

A. They had very little furniture. They had [46] only stoves.

Q. Anything else besides stoves?

A. No.

Q. Bed? A. No.

Q. When you purchased them they had stoves——

A. When I received the house they didn't have anything, just the stoves.

(Testimony of Carlotta Arreola.)

Q. And when was that, Mam?

A. It was in September or October; I don't remember very well, but it was just about the time the year was coming to a close.

Q. Which year; 1947? A. 1947.

Q. Thank you very much. Your witness.

Cross Examination

Q. (By Mr. Parker): You finished?

Mr. Murlless: Yes.

Q. Mrs. Arreola, at the time you bought this property is it not true that all of the cabins there had beds, springs and mattresses? A. No.

Q. With people living in them, that is, tenants, at the time you bought the property? [47]

A. Yes; they were living there rented, but when I received the houses they left and when I got the houses there wasn't anything in them.

Q. Did your tenants take away the beds?

A. I don't know whether they took them with me or not, because, if my husband received the houses I did not know.

Q. You did not receive the houses?

A. My husband received them.

Q. Where were you at the time?

A. In my house; I lived in Jefferson Street. When I went to see the houses that were on the property there wasn't anything in them.

Q. Mrs. Arreola, did you and your husband run a furniture store? A. Yes.

Q. And your husband took out the furniture

(Testimony of Carlotta Arreola.)

that was in there and refurnished all of the houses, did he not, of furniture in the houses?

A. The people who live there own their own furniture.

Q. At least that's what they told you?

A. Yes.

Q. These houses all had hot water heaters did they not?

A. Yes. [48]

Q. And those had just previously a short time previously been installed by Mr. Spriggs before you bought the place?

A. I do not know when he would have installed them. When we got the houses I don't know how the hot water system got there, but it was a very old system.

Q. But the heaters had only recently been installed, had they not?

A. Yes, I don't know. I received the stoves.

Q. Now, there were ice boxes in all of these buildings, were there not?

A. The largest house had an ice box, but it wasn't used; it was outside because they had a refrigerator outside.

Q. Did you get the refrigerator with the place?

A. No; it was theirs.

Q. I see. Well, isn't it true that the little houses all had one ice box?

A. I didn't see anything. It's possible that my husband could answer that question, but I can't.

Q. Now, are you prepared to say that the buildings didn't all have tables and chairs at the time

(Testimony of Carlotta Arreola.)

this sale was made, or do you know about that?

A. I didn't see anything; for this reason I can't say what they had. [49]

Q. Do I understand you correctly, Mrs. Arreola, that it was sometime after your husband had taken charge of this property that you saw the, it for the first time?

A. Yes; that's the truth. It's the first time I had seen them when he received it; before I had not seen them.

Q. Now, Mrs. Arreola, you were making payments in 1948 and up until at least February 26 of 1949 to the Valley National Bank, weren't you? Immediately after you bought the property you started making payments to the Valley Bank?

A. Yes.

Q. And your payments came twice a year?

A. Yes.

Q. And you did not make any payments—you did not make any payments directly to Mr. Spriggs, did you?

A. No. Other than the first \$4,000 we paid. If the other money was paid directly to him I didn't know about it.

Q. The first \$4,000 you say you paid to the real estate company? A. Yes.

Q. Now, do you know that the Valley Bank owned the mortgage and the note on which you were [50] making payments to the bank?

A. Yes, because we made the payments to the bank. We paid the bank.

(Testimony of Carlotta Arreola.)

Q. That's all.

Redirect Examination

Q. (By Mr. Murlless): You don't know who, to whom the money went, except you made the payments to the Valley National Bank?

A. Yes, to the Valley Bank.

Q. But the \$4,000 was a cash down payment?

A. Yes.

Q. Thank you very much, Mam. May this witness be excused, too, if your Honor please?

Mr. R. A. Thompson.

RUSSELL A. THOMPSON

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Murlless): May I ask again, what is your name? A. Russell A. Thompson.

Q. Where do you live? [51]

A. 3513 East Van Buren.

Q. What is your work?

A. Barber, broker and motel operator.

Q. How long have you lived in Phoenix?

A. Between 12 and 13 years.

Q. What was your work in 1945, sir?

A. In 1945 I was a real estate salesman and also a motel operator.

Q. And in connection with your work in 1945 did you know the defendant, Claude E. Spriggs?

(Testimony of Russell A. Thompson.)

A. Yes, sir.

Q. And in what connection if you can recall?

A. I had a listing on a piece of property at 2008 East Henshaw Road and Mr. Spriggs came in to see me at the office of J. O. Snowden in regards to buying some real estate.

Q. During that year you were employed as a salesman by Mr. J. O. Snowden, is that right?

A. Yes.

Q. Where was the office?

A. Second Avenue catercorner from it, the Orpheum Theatre.

Q. How long had you been in the real estate business at that time, sir?

A. Approximately two or three years.

Q. Now, I hand you a piece of paper and ask [52] you generally what it is; just a general description of it, sir?

A. That's a preliminary sales contract.

Q. Is it in connection with the defendant, Claude E. Spriggs? A. Yes, sir.

Q. I move for its being marked for identification, if your Honor please.

(Whereupon the document was marked as Government's Exhibit 9 for identification.)

Mr. Murlless: I hand you Government's 9 for identification, Mr. Thompson, and ask you if that is in connection with the sale or of the transaction about which you speak with respect to land on 2008 East Henshaw Road? A. Yes, sir.

(Testimony of Russell A. Thompson.)

Q. And will you state in that general connection what it is.

A. It's the agreement. It's an agreement. It's an agreement that we drew up in regard to the price and the deposit that I received.

Q. From its face Government's 9 purports or appears to be signed by the defendant, Claude E. Spriggs?

A. Yes, sir.

Q. Did you observe his signature there? [53]

A. Yes, sir.

Q. Is that also the agreement that you came to?

A. Yes, sir.

Q. I move its admission, if your Honor please.

(Thereupon the document was handed to counsel for defendant.)

Mr. Parker: No objections other than the general objection.

Mr. Murlless: I move again for admission of Government's 9 in evidence.

The Court: Admitted.

(Whereupon the documents were marked as Government's Exhibit 9 in evidence.)

Mr. Murlless: Rather than read this I'll ask Mr. Thompson to paraphrase the agreement if he may, if your Honor please.

A. Do you want me to read it?

Q. No, if you will paraphrase it, tell the jury what the agreement is as reflected there.

A. It was the sale of two lots and on one lot there was two or three rentals there at the time I

(Testimony of Russell A. Thompson.)

sold this property, and would you like me to tell some of the transactions?

A. Yes, sir; please.

Q. Well, it was owned by a man by the name of [54] Mr. Murphy and he was very badly in need of money and came to me with this listing.

Q. Was it Frank Murphy?

A. Yes, he was a plumber, and he was having considerable domestic trouble with his wife who later passed away and he told me to sell the property. He was asking more money for it.

Q. How much was he asking for it?

A. Well, I'll have to go just from memory. It was up in a \$3,000 figure.

Q. Go right ahead, sir.

A. The question on making this sale, Mr. Murphy wanted to sell one lot and the rentals and keep the other lot, and Mr. Spriggs was interested in getting both lots and the rentals so it was just merely a question of us coming to terms on a price which we had, did, very easily, and then I went into the office and drew up a preliminary agreement, contract.

Q. That was it, that being the preliminary contract there? A. Yes.

Q. And for how much money did it call for, consideration of that property? A. \$2,700.

Q. And what was the location of it then? [55]

A. 2008 East Henshaw Road.

Q. Do you know, sir, of your own knowledge what the legal description is?

(Testimony of Russell A. Thompson.)

A. Without looking at this paper—do you want me to look at it?

Q. Yes, it is in evidence.

A. I'll look at it and I'll be sure. 2008 East Henshaw. Two lots. A building and furniture on owner's side. Lots 47 and 48, block two, Eubanks Tract. That's the complete——

Q. Can you tell there how many units, improvements there were upon those lots?

A. Either two or three rentals. I'm not positive which.

Q. Do you recall whether you had an opportunity to look at them on or about the date that contract bears?

A. At the property?

Q. Yes, sir.

A. Mr. Spriggs and myself went out to see Mr. Murphy and we come to an agreement while we made the first trip out there.

Q. I see; and Mr. Murphy at that time did go to the property to show it?

A. Mr. Murphy was at the property when we arrived. [56]

Q. If you can recall to the best of your ability the nature of the improvements that were there.

A. They were one-room rentals.

Q. Constructed wood, or something else?

A. Cement block, if I am not mistaken.

Q. And to the best of your knowledge——

A. They were quite new; just been built.

Q. Two or three of them?

A. Yes, sir.

Q. Big or small?

A. Small.

(Testimony of Russell A. Thompson.)

Q. Relatively small? A. Yes.

Q. Will you state the date when that agreement was consummated? A. May 26, 1945.

Q. And in that connection and in the same connection, that is with that preliminary agreement, did you have further contact with Mr. Murphy or Mr. Spriggs and, if so, will you state to the jury the circumstances?

A. I filed it, followed the standard procedure on this transaction. I had to draw it up and I went to Sprigg's office and he signed it and Spriggs took me out to his home—I forget the [57] exact address—but it was in the Encanto district, and his wife signed and I immediately went out to Mr. Murphy and he signed and I made a trip out on Grand Avenue. Mrs. Murphy was staying in some court, I don't remember, and she signed.

Q. All signed that agreement in your presence?

A. Yes.

Q. Then did you observe or have any part of the handling of the funds name there, \$2700?

A. I received the \$500. I don't remember if I turned it to Snowden or directly to escrow.

Q. By that will you explain what you mean "directly to escrow."

A. In all of our sales we have set up a preliminary escrow instructions up in the Title and Trust Building, and of course the property is checked for anything that might be against it, so that the buyer will receive a good title and at the end of that check and at the end of that escrow generally the

(Testimony of Russell A. Thompson.)

buyer is notified to come in and bring the balance of the money and consummate the sale.

Q. And did you have occasion, or can you recall whether or not you were present at the closing of that escrow? A. No, I wasn't. [58]

Q. You handled about \$500 of that \$2,700?

A. Yes, sir.

Q. And as far as you know that's all?

A. Yes, sir.

Q. Was there any other money other than that which was agreed upon there paid by Mr. Spriggs by Mr. Murphy to your knowledge?

A. Not to my knowledge.

Q. Do you have any reason to believe there was or was not?

A. Any—neither one way or the other—I have no reason to believe one way or the other.

Q. Your witness.

Cross Examination

Q. (By Mr. Parker): Mr. Thompson.

A. Yes.

Q. Would it refresh your recollection to suggest to you that the building or buildings there might be what would be commonly called a duplex of some sort?

A. Like I say, I don't remember if it was a duplex or a triplex.

Q. Does the expression "furniture in owner's side" suggest a duplex to you?

A. It wouldn't necessarily. [59]

(Testimony of Russell A. Thompson.)

Q. Well, if I suggested to you that it was simply two one-room rentals, would that refresh your recollection any?

A. I'd hate to say, because I really don't remember if it was two or three.

Q. Well, now, Mr. Thompson, you spoke of these small one-room buildings, but you stated that they were new.

A. They were comparatively new.

Q. Did you mean to imply that they were not completed, that the construction had ever been completed on those?

A. Yes; they were completed.

Q. Isn't it a fact that there were no bathroom fixtures in either one of them?

A. That I do not remember.

Q. Is it not a fact that they had never been finished on the interior?

A. I rather imagine there was, probably what was in them what they were building mostly at that time was showers and toilets.

Q. Do you recall that there were no bathroom fixtures at all in these?

A. No; I don't recall that.

Q. Do you recall that they were unceiled—there was no ceiling? [60]

A. There was ceilings.

Q. You do recall that? A. Yes.

Q. Are you quite positive about that?

A. Yes.

(Testimony of Russell A. Thompson.)

Q. What kind of roofs did they have on them, if any? A. I believe flat roofs.

Q. Flat roofs?

A. I believe so. Composition, I rather imagine.

Q. Were they plastered on the inside?

A. I rather imagine they weren't. Probably wallboard.

Q. As a matter of fact, there was no wallboard whatsoever, Mr. Thompson.

A. There was wallboard.

Q. You are quite positive?

A. I'm quite positive.

Q. When did you last see the property?

A. In 1945.

Q. That's the last time you have seen it?

A. That's right.

Q. If I remember, suggested, to you that there is no wallboard even to this date and never was, you would still insist there still was? [61]

Mr. Murlless: I object to the form of the question.

The Court: You may answer it.

A. There was wallboard at the time I sold the property.

Q. You are quite sure? A. Yes, sir.

Q. Was there a bill of sale, Mr. Thompson, made on this furniture that's referred to here in Exhibit 9? A. I don't remember.

Q. Maybe; do you recollect looking at the Exhibit that there was some furniture?

(Testimony of Russell A. Thompson.)

A. Well, there is no way of telling by this piece of paper whether there was or wasn't.

Q. There is some reference to furniture there?

A. That's right. Many times when there is a small amount of furniture we merely group it as a whole in this way. That depends quite often on the buyer and seller how they agree on it.

Q. By the way; there is one other question. Now, this property is located in the southeastern section of Phoenix, is it not? A. Yes, sir.

Q. And in what school district?

A. That I couldn't tell you. I believe at [62] that time, let's see, Wilson, I believe at that time, but I couldn't tell you what it is now.

Q. The surrounding neighborhood there was of what character? A. It is quite vacant.

Q. Who is what?

A. Everything was pretty well vacant at that time I sold the property.

Q. Vacant lots around there?

A. Yes, sir.

Q. Not an improved or built-up neighborhood at all? A. No, sir.

Q. And how would you class it in real estate or whatever terminology you use as to the type of neighborhood?

A. Well, we considered it a class F neighborhood that was hard to sell real estate in.

Q. Hard to sell?

A. Yes, sir. At that time.

Q. That's all.

(Testimony of Russell A. Thompson.)

Mr. Murlless: Thank you very much, sir. Mr. Harry C. Jones, if your Honor please.

HARRY C. JONES

was called as a witness on behalf of the Government, and being first duly [63] sworn testified as follows:

Direct Examination

Q. (By Mr. Murlless): Mr. Jones; I believe you stated "Harry C. Jones?"

A. That's right.

Q. What is your work?

A. Escrow Officer of the Arizona Title Guarantee and Trust Company.

Q. How long have you been so employed?

A. Since 1945.

Q. How long have you lived in Phoenix?

A. Since 1941.

Q. And the company for which you work is Arizona Title Guarantee and Trust Company, and is it a business, sir, within your knowledge that is a part of which business is the keeping of records?

A. Yes.

Q. And, generally, will you state to the jury the nature of the records kept there and maintained over a period of years as official records of that company?

A. The original escrow instructions, as signed by the buyer and seller. Any papers or receipts in connection with payments and [64] disbursements. In fact, anything in connection with the

(Testimony of Harry C. Jones.)

entire handling and consummation of the escrow.

Q. Purchase and sale of real property, that is what you mean by an escrow? A. Yes.

Q. And ancillary to a purchase and sale of a property? A. Yes.

Q. And that is the nature of the official records kept by that company? A. Yes.

Q. And in that connection you are an Escrow Officer? A. Yes, sir.

Q. Your company was served with a subpoena duces tecum in a certain case, United States Government versus Claude E. Spriggs, C-10711?

A. Yes.

Q. And in that connection were you designated as the custodian of certain records of that company? A. Yes.

Q. I'll ask you, sir, if you brought those records with you? A. Yes, sir. [65]

Q. And will you state whether or not you have a set of records, escrow records, upon an Eglar-Spriggs transaction? A. Yes.

Q. Will you state to the jury, please, about the date of its consummation?

Mr. Parker: I'd like to make this objection, generally, and let it go to all the questions of the witness hereafter; the objection of former adjudication.

The Court: Continue.

Mr. Murlless: Proceed, please, sir.

A. Will you state that question, please?

(Testimony of Harry C. Jones.)

(Thereupon the last question was read to the witness by the reporter.)

A. March 24, 1945.

Q. And is that the opening or closing date?

A. Closing date.

Q. Closing date of the escrow? And who were the parties to it, sir?

A. Jacob Eglar, seller; Claude E. Spriggs; Evelyn Lee Spriggs, buyer.

Q. And the description of the property involved, if it is there and you can state it.

A. Lot 7 and 8, block 15, Collins Addition.

Q. Is there any way from your records to state the street address? Of that property?

A. No.

Q. Was any personal property sold in the deal by Eglar to Spriggs?

A. According to the records there was nothing handled in the way of personal property.

Q. Part of those records in any event. All right, sir, was it an out and out sale?

A. Cash sale, what we would determine.

Q. And when did title pass to the defendant, Claude E. Spriggs?

A. On March 4, 1945.

Q. And in that connection does the record reflect the receipts for payments by Mr. Spriggs to Mr. Eglar?

A. Yes.

Q. In what sums were they, sir? Those payments?

A. There was \$1,000 that was deposited at the

(Testimony of Harry C. Jones.)

time of escrow was started, January 19, 1945, and \$4,000 was deposited on March 12.

Q. 1945? A. Yes.

Q. Do you have the original of those receipts?

A. I have the photostatic copy and I also have a copy, it's the original of the receipt, I imagine, which—— [67]

Q. The original of the receipt; you have an original duplicate of the receipt?

A. That's right. That's a photostatic copy of the receipt.

Q. And it is your request for the integrity of your records of the Arizona Title and Guarantee Company that the receipts be used only for the purpose of determining that the escrow, the copies are true copies, is that right? A. Right.

Q. May I have them for their marking for identification?

Mr. Parker: Mr. Murlless, you don't need to go to that trouble. If the witness says they are true copies just go ahead and examine the photostats.

Mr. Murlless: And you did examine the marking of this photostat? A. Yes.

Q. They do represent exactly, exact photostatic copies of the receipts which were given for funds paid by Mr. Spriggs to the account of the Eglars?

A. They do.

Q. Is that true? A. Yes, sir.

Q. May this be marked, if your Honor please, [68] for identification?

(Testimony of Harry C. Jones.)

(Whereupon the document was marked as Government's 10 for identification.)

Mr. Murlless: Government 10 comprises those two receipts of which you have just testified, Mr. Jones, is that true? A. Right.

Q. Move their admission in evidence, if your Honor please.

(Thereupon the document was handed to counsel for defendant.)

Mr. Parker: I object to it on the ground that there is no foundation laid. The defendant doesn't appear to have signed these two receipts. Not chargeable with them.

The Court: They are admitted.

(Whereupon the document was received as Government's Exhibit 10 in evidence.)

Mr. Murlless: In that same connection, sir, particularly with respect to the transaction you have just been testifying, do you have some other of the official records of the Guarantee Trust Company?

A. I have; the photostatic copies of the original escrow instructions signed by both the buyer and seller. [69]

Q. Is it four loose photostatic papers?

A. That's right.

Q. Are those four loose photostatic copies exact copies? Of the escrow instructions? As appear in the records of the Arizona Title and Guarantee and Trust Company? A. Yes, sir.

Q. May this appear as Government's 11 for identification?

(Testimony of Harry C. Jones.)

(Whereupon the document was received as Government's Exhibit 11 for identification.)

Mr. Murlless: I hand you Government's Exhibit 11 for identification and ask you if that, those are photostatic copies of the original escrow instructions that are part of the official records of the Arizona Guarantee and Title Company?

A. Yes.

Q. I move for their evidence.

Mr. Parker: May I ask a question on voir dire? Mr. Jones, are you acquainted with the defendant?

A. I might possibly have seen him. I'm not acquainted with him.

Q. You don't know him? A. No.

Q. And at the former trial you also stated you weren't acquainted with him and didn't know him? Now, awhile ago when you stated that these escrow instructions which are now the subject of Government's Exhibit 11 for identification were signed by the parties, did you intend to convey the impression that you know Mr. Spriggs' signature, that you so identify it? A. No.

Q. Did you see Mr. Spriggs or Mrs. Spriggs since then? A. No.

Q. Object to it on the grounds there is no proper foundation laid.

The Court: You expect to supplement that?

Mr. Murlless: The answer to your question, if your Honor please, is no. However, there are evidences of the handwriting that are in the Court and

(Testimony of Harry C. Jones.)

in evidence with respect to which there has been a third party evidence, and that's all I think.

The Court: Admitted.

(Whereupon the document was received as Government's Exhibit 11 in evidence.)

Mr. Murlless: Does Government's Exhibit 11 in evidence reflect to your understanding and in your official capacity the date when title passed of the property about which you have been testifying?

A. There would be nothing on here that would show the date that the title passed to Mr. Spriggs. This is the date here that shows when the escrow was started.

Q. And that date is when, sir?

A. January 19, 1945.

Q. Does it also show when it is closed?

A. Not on there; I do have a record on the county recorder's receipt that shows that it was recorded on March 24, 1945.

Q. March 24, 1945, and that is a statement that you make from the official records?

A. Right.

Q. And, generally speaking, what is the source of that, sir?

A. That is the receipt that is stamped by the County Recorder at the time the documents are recorded, at the time the documents are presented to the County Recorder for recording.

Q. And what was the date again, sir?

A. March 24, 1945.

Q. Thank you. From Government's Exhibit 11,

(Testimony of Harry C. Jones.)

sir, can you tell the aggregate of the consideration paid? A. \$5,500.

Q. Now, will you state whether or not your [72] records also reflect a sheet upon those escrow instructions that are Government's Exhibit 11 in evidence? Settlement sheet? A. I have it.

Q. You hand me a photostat; does that exactly represent the settlement sheet as it appears in your files? A. Yes.

(Whereupon the document was received as Government's Exhibit 12 for identification.)

Mr. Murlless: I hand you Government's Exhibit 12, sir, and ask you to tell the jury what it represents in the business with respect to which you are, your experience and your office is held.

A. It covers all of the receipts and disbursements in connection with the escrow.

Q. Is the escrow with respect to which you have just been testifying? A. Yes.

Q. Will you state the legal description, if it appears.

A. Lots 7 and 8, Block 15, Collins Addition.

Q. And the parties.

A. Jacob Elgar selling to Claude E. Spriggs and Evelyn Lee Spriggs.

Q. And does Government's 12 for identification [73] represent a settlement by your company with the parties to that transaction?

A. That's right.

Q. And it is a copy of the official records?

A. As we made our settlement.

(Testimony of Harry C. Jones.)

Q. We offer it as Government's 12.

(Thereupon the document is handed to counsel for the defendant.)

Mr. Parker: I have no specific objection to this.

(Whereupon the document was received as Government's 12 in evidence.)

Mr. Murlless: And in addition to the sum which you stated, \$5,500, as being the sales price upon the purchase by Mr. Spriggs on this transaction, did he have to pay anything else, any other money?

Mr. Parker: Your Honor, the exhibit speaks for itself. It's been adequately explained. The witness says he doesn't know the defendant and yet the form of counsel's question would imply that he did, and I think the exhibit is perfectly evident, and may be circulated among the jury.

The Court: He may ask. What else did he pay?

A. I didn't.

The Court: What else did he pay besides [74] \$5,500?

A. \$5,500 was the selling price. Mr. Spriggs received a return of \$40.63 due to rent adjustments and a pro-ration of the taxes.

Q. Paid \$5,500, and then was refunded?

A. \$40.33.

Q. As a prorate of the rent on the property?

A. Yes, sir.

Q. Now, in connection with the same property not the same escrow, but the same property, will you state whether or not the official records of the Arizona Guarantee Title and Trust Company re-

(Testimony of Harry C. Jones.)

flected in its official records itself, when, the record of this same property with respect to when Mr. Spriggs sold it? A. No.

Q. What was the other party to that transaction?

A. Jesus S. Arreola and Carlotta G. Arreola.

Q. And upon what date was the transaction consummated?

A. That was consummated on August 27, 1947.

Q. And in that connection what, generally, do your official records reflect, what are the instruments of which you have been requested to bring to court today? [75]

A. The escrow instructions, the settlement sheet and a photostatic copy of the check in settlement of the sale to Mr. Spriggs.

Q. That's the payment to Mr. Spriggs of a check of the Arizona Guarantee Title and Trust Company?

A. Covering the net proceeds.

Q. Very well, sir; and may I have the copy of the escrow instructions?

The Court: Oh, just give it a figure. You don't need all of that. How much did he get out of it?

A. The net proceeds were \$3,474 and 77 cents and a mortgage for \$4,500.

Mr. Murlless: The figures again?

A. \$3,474 and 77 cents.

Q. Did you hear the testimony of Mrs. Arreola this afternoon? A. Yes, sir.

(Testimony of Harry C. Jones.)

Q. She stated, do you recall that she stated there was a \$4,000 down payment?

A. Yes, sir.

Q. Did you tell the jury what happened to the other parts of in general what happened to the, it, or is it reflected in one of these instruments?

A. It would be reflected in this closing [76] statement.

Q. May I have it and may it be marked for identification, if your Honor please. That's the last page here, sir.

A. That's the last page.

(Whereupon the document was marked as Government's Exhibit 13 for identification.)

Mr. Murlless: I hand you Government's Exhibit 13 and is that the settlement sheet on the Spriggs-Arreola? A. Yes.

Q. It is the photostat of the official records of the settlement with the two parties of the transaction? A. Yes.

Q. May I move it be admitted in evidence, if your Honor please.

(Thereupon the document was handed to counsel for defendant.)

Mr. Parker: Object to it on the ground of insufficient foundation.

The Court: Admitted.

Q. And without reading all of it, sir, is the difference between \$3,474.77 and \$4,000 reflected in the entries in Government's 13 in evidence?

A. Yes. [77]

(Testimony of Harry C. Jones.)

Q. Just generally speaking, that difference is reflected there by payments that were made before the funds were paid over? A. That's right.

Q. Thank you very much, sir. Now, in this—has your attention been directed, sir, to certain documents with respect to another transaction purportedly, or, I won't mention the name, Spriggs and Van Denburgh? A. Yes, sir.

Q. And in that connection will you state concerning what property your records have a reference to there?

A. Lot 6 and the south 10 feet, Eastwood Place, and east ten feet thereof.

Q. And from those records, sir, could you tell what the street address of that legal description is?

A. No.

Q. Who were the parties again?

A. Claude E. Spriggs and Evelyn Spriggs, Lee Spriggs, sellers, and Howard M. Van Denburgh and Ruth E. Van Denburgh.

Q. And what was the date of the transaction?

A. It started on October 30, 1947, and consummated on November 20, 1947. [78]

Q. And in that connection did you have, generally, the same records that you have stated with respect to the two other transactions?

A. Yes.

Q. And what was the amount of money paid?

A. \$2,700.

Q. And how much of that was paid to Mr. Spriggs? A. \$2,696.59.

(Testimony of Harry C. Jones.)

Q. Do you have a settlement sheet that reflects the difference between those figures?

A. Yes.

Q. Is it the photostatic copy of the official records of the Guarantee Company, reflecting that difference in this transaction? A. Yes.

Q. I move it be marked for identification, if your Honor please.

(Whereupon the document was marked Government's 14 for identification.)

Mr. Murlless: Is Government's Exhibit 14 for identification that settlement sheet with respect to that transaction? A. Yes.

Q. We move for submission into evidence, if your Honor please. [79]

Mr. Parker: I object on the same grounds as before; no proper foundation.

The Court: Admitted.

(Whereupon the document was received as Government's Exhibit 14 in evidence.)

The Court: Cross examination.

Cross Examination

Q. (By Mr. Parker): Mr. Jones, do you know whether or not the \$4,500 mortgage arising out of the Arreola deal was sold at a discount to the Valley National Bank?

A. No, I would have no way of knowing.

Q. The record doesn't show it any place? Of the transfer of the mortgage to the Valley National Bank at a value lower than its face? A. No.

(Testimony of Harry C. Jones.)

Q. You don't know of your own knowledge that this gentleman sitting to my right is the Claude E. Spriggs that appears on these instruments, do you?

A. No.

The Court: Jurors, come back at one o'clock.

(Thereupon the Court was recessed at 4:10 o'clock p.m. until the following day at 1:00 p.m.) [80]

(All parties having heretofore been noted, the trial resumed as follows on April 1, 1954, at 1:07 o'clock p.m.)

Mr. Murlless: In the best of my recollection Harry C. Jones was on the stand.

The Court: I thought you were through with it.

Mr. Murlless: I was, if your Honor please. May he be excused. Mr. Charles R. Custin. Do I understand I am to proceed?

The Court: Yes.

CHARLES R. CUSTIN

was called as a witness on behalf of the Government and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Murlless): What is your name, please? A. Charles R. Custin.

Q. What is your work?

A. I am an Escrow Officer of the Phoenix Title and Trust Company.

Q. For how long? A. Eighteen years.

(Testimony of Charles R. Custin.)

Q. How long have you lived in the State of [81] Arizona? A. Twenty-one years.

Q. And as such officer, that Escrow Officer of that company, have you been delegated for the custody of certain records that were brought to trial in this case today? A. I have.

Q. And in that connection, generally, sir, is the Phoenix Title and Trust Company an organization, a part of the business of which is a keeping of records? A. That is true.

Q. And, generally speaking, will you tell the jury the nature of the record you have brought today?

A. One, an escrow for the sale of property, and the other is the title search for the issuance of the title policy.

Q. These are both parts of the official records of the Phoenix Title and Trust Company of Phoenix? A. That is correct.

Q. With respect to those records, sir, do you have a reference or some of your records with reference to a Murphy-Spriggs transaction sometime in 1945, about May 26, 1945? [82] A. Yes.

Q. In that connection what real property did it involve?

A. Lots 47 and 48, Block 2, Eubanks Tract.

Q. And further—that is an addition to the city of Phoenix, Maricopa County?

A. That is correct.

Q. Will you state the full names? Of the parties involved?

(Testimony of Charles R. Custin.)

A. Frank Murphy and Connie Murphy, his wife, as sellers, and Claude E. and Evelyn Lee Spriggs as buyers.

Q. This is a part of the transaction, or transfer, of title from the Murphys to Mr. Spriggs at about that date in 1945? A. That is correct.

Q. Real property transaction?

A. That is correct.

Q. Does it show the—do you have a paper there in which the money transactions were recorded?

A. The final settlement statement.

Q. That will be fine, sir. May this document—this is what you speak of, a settlement sheet?

A. That's right; that's the final settlement sheet.

Q. May this document be marked for identification, [83] if your Honor please?

(Whereupon the document was marked as Government's Exhibit 15 for identification.)

Mr. Murlless: I hand you Government's 15 for identification and ask you if that's the settlement sheet about which you have been testifying, sir?

A. Yes, sir.

Q. And involving the real property, what is the description?

A. Of lots 47 and 48, Block 2, Eubanks Tract.

Q. And a seller by the name of?

A. Frank Murphy and his wife to Claude E. Spriggs and his wife.

Q. And does it record money transactions in that regard, or connection?

(Testimony of Charles R. Custin.)

A. That's true.

Q. Move for its admission in evidence, if your Honor please.

(Whereupon the document was marked as Government's 15 in evidence.)

Mr. Parker: Objection to it on the ground no proper foundation has been made.

The Court: Admitted.

Mr. Murlless: I hand you Government's 15 in evidence, Mr. Custin, and ask you what was the [84] consideration paid in connection with that real property transaction about which you have just testified? A. \$2,700.

Q. Paid by whom?

A. The agent for the account of Mr. Spriggs.

Q. And in that connection does your records show that there was any more cost to Mr. Spriggs except that \$2,700?

A. There was costs, but there was off-setting credits, so that there was no additional money put up.

Q. Will you state to the jury the circumstances, if they are reflected there?

A. An escrow fee, \$6.25 and recording fee of \$1.95, and a credit of 52 cents for taxes and a credit of the \$17.64 for rent, leaving a net return to the buyer of \$9.96.

Q. Thank you very much, sir. I believe that you stated at first that you also had an official record with respect to another transaction, if I un-

(Testimony of Charles R. Custin.)

derstood, was a Fisher-Spriggs transaction, sometime in September of '47?

A. That was a request for issuance of a title policy on him.

Q. And by whom was it made? [85]

A. Claude E. Spriggs.

Q. And do you have a copy of that request, sir?

A. Yes, I do.

Q. And do you know that pursuant thereto that finally a title policy was issued to Spriggs?

A. Yes; I have a photostatic copy of each. You want one at a time?

Q. The application for title policy is the first document you gave me? A. Yes.

Q. May this be marked for identification, if your Honor please.

(Whereupon the document was marked as Government's Exhibit 16 for identification.)

Mr. Murlless: I hand you Government's 16 for identification and ask you if that is the application appearing there in the name of Claude E. Spriggs for a title policy in regard to a Fisher-Spriggs transaction in September of 1947?

A. That is correct.

Q. Of your official records? A. Yes.

Q. A photostatic copy of records that are kept in the regular course of business of the Phoenix Title and Trust Company?

A. That is right. [86]

Q. Move for its admission in evidence, if your Honor please.

(Testimony of Charles R. Custin.)

(Thereupon the document was handed to counsel for the defendant.)

Mr. Parker: Object on the ground that no proper foundation has been laid.

The Court: Admitted.

(Whereupon the document was received as Government's Exhibit 16 in evidence.)

Mr. Murlless: I hand you Government's Exhibit 16 in evidence, Mr. Custin, and ask you if pursuant thereto a title policy was issued in the name of Claude E. Spriggs and the date it was issued, if you will state?

A. It was issued to Claude E. Spriggs and his wife under date of October 11, 1947.

Q. Thank you very much, sir.

The Court: Is that the item in which you claim depreciation was over-stated?

Mr. Murlless: This is the Spriggs-Fisher, if your Honor please, and it's not an item in which we claim over-statement of depreciation, on the other hand an item we expect to, we ask for a taxable gain in 1947.

The Court: How many?

Mr. Murlless: Two of that type; this is one [87] and the other was the Spriggs-Eglar-Arreola or Collins Addition.

The Court: What was the transaction where the woman——

Mr. Murlless: The Spanish-American?

The Court: No.

Mr. Murlless: Mrs. Fisher?

(Testimony of Charles R. Custin.)

The Court: This is the same?

Mr. Murlless: Yes; this represents what it costs, what the costs were in addition to what she stated.

Q. And you have the title policy?

A. Yes.

Q. You stated it was issued in October of '47 to Claude E. Spriggs? A. That's correct.

Q. Thank you very much, sir; your witness.

Cross Examination

Q. (By Mr. Parker): Mr. Custin, what is your position with the Phoenix Title and Trust Company? A. Escrow Officer.

Q. Are you the head of the Escrow Department?

A. I'm the second in charge.

Q. Second in charge; and have you been testifying with respect to transactions that you, [88] personally, handled? A. No.

Q. Then I take it that if you did not handle any of these transactions about which you have testified at the time then all of your testimony is based upon your interpretation of what you found in the records of the title company?

A. That's quite true.

Q. You have no personal knowledge of any of the matters about which you testified?

A. That's correct.

Q. Are you acquainted with the defendant, Claude E. Spriggs? A. Yes.

Q. How is that, sir? A. Yes.

Q. How long have you known him?

(Testimony of Charles R. Custin.)

A. About ten or twelve years, I guess.

Q. About ten or twelve years. Do you know who did handle the transactions that you have testified about?

A. Yes.

Q. Who?

A. The escrow with Frank Murphy was handled by a man by the name of Sordeman.

Q. Is he an employee of the Phoenix Title [89] and Trust Company?

A. No, he's not at present.

Q. Was he at the time? A. Yes; he was.

Q. What about the other matter that you have testified to?

A. It was handled in our title department and that order was taken by the title department's order desk.

Q. Do you know who that would be?

A. Let's see whether I—no, it was just put in the regular course of business and I don't, I can't say for sure that I recognize the handwriting.

Q. Mr. Custin, I understand, understood, that, you to testify that in connection with Exhibit 15, which, as I recall it, was described as a settlement sheet, that the sheet disclosed the payment in connection with that transaction of \$2,700 by one J. O. Snowden?

A. That is correct.

Q. And if I heard you correctly, you stated at the time that he paid that as agent for Claude E. Spriggs.

A. No; the agent paid it for the account of Spriggs. The receipt issued that way. [90]

(Testimony of Charles R. Custin.)

Q. For the account of Claude E. Spriggs?

A. Yes.

Q. You, of course, have no personal information about that transaction other than as you have testified just what you saw on the basis of the title company?

A. That is correct.

Q. Do you know Mr. Snowden? J. O.?

A. Yes, sir.

Q. There is no showing there in your records that Claude E. Spriggs paid anything there into that escrow?

A. Directly, no.

Q. That's all.

Redirect Examination

Q. (By Mr. Murlless): Do you have a copy of that receipt?

A. I have a photostatic copy of it.

Q. That you just testified to?

A. It's attached to the escrow instructions, too.

Q. And this copy or receipt is a true photostatic copy of a record that is of the official records of the Phoenix Title and Trust Company?

A. That was received, yes.

Q. I move for it being identified, if your [91] Honor please.

(Whereupon the document was marked as Government's Exhibit 17 for identification.)

Q. And you are custodian of this record in the same way that the others you have testified to?

A. That is correct.

(Testimony of Charles R. Custin.)

Q. Move its admission in evidence, if your Honor please.

(Thereupon the document was handed to counsel for the defendant.)

Mr. Parker: If it please the Court, I object to it upon the grounds that there is no proper foundation, has been established in any, my judgment, and further, that I find the Exhibit unreadable. I'm unable to decipher the contents. There seems to be some form of characteristics on that; I can't, and I think my eyes are about average. I can't make out the contents of the exhibit, therefore don't know what it's being offered as to content.

The Court: Can you read it?

Mr. Murlless: Yes, sir; it's not easy.

The Court: Go back and read it to Mr. Parker in an undertone.

Mr. Parker: Go ahead and put it in; I have made my objections. [92]

The Court: Admitted.

Mr. Murlless: Now, sir, I can't say whether I asked you this question or not, but how much, if anything, does your record was paid by Mr. Spriggs for the title policy application for which was made as he stated under Government's Exhibit 6, which was issued as you stated sometime in October of 1940?

A. I can't say who paid it, but I know how much was paid.

Q. How much? A. \$22.

Q. Very well; about 9-15-47?

(Testimony of Charles R. Custin.)

A. That was paid; usually at the time the order is put in it is marked it was paid at that time.

Q. And Government's 16 in evidence indicates also by notation that it was paid at that time?

A. 9-15-47.

Q. Received \$22; is there a notation to that effect? A. \$22 paid at the bottom.

Q. And may this witness, too, be excused, if your Honor please?

The Court: No cross?

Mr. Murless: Mr. C. L. Howard. And may I ask your Honor again, please? [93]

C. L. HOWARD

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Murless): And may I ask your name again, please? A. C. L. Howard.

Q. And where do you live?

A. 2530 East Roma.

Q. Phoenix? A. Yes.

Q. How long have you lived in Phoenix?

A. Twelve years.

Q. You lived here, I take it, in 1945?

A. Yes.

Q. Know the defendant, Claude E. Spriggs, who sits to the right behind me? A. Yes.

Q. And in what connection do you know him?

A. I sold him a piece of property.

(Testimony of C. L. Howard.)

Q. And where was it located?

A. 515, 517 East Pierce.

Q. Do you know in general its legal description?

A. No, I don't.

Q. Will you describe the property for the jury in general terms to the best of your ability? [94]

A. It was a two-story, four-unit apartment house.

Q. Two-story, four-unit apartment house?

A. Yes.

Q. What nature, kind of construction?

A. Cement block.

Q. And that 515 East Pierce?

A. That's right.

Q. In the city of Phoenix?

A. That's right.

Q. And what was the consideration, if you will recall? A. \$10,500.

Q. First, do you have a record or independent records of that transaction? A. I do.

Q. I'm sorry not to have had an opportunity to see your records before, but may I see them for a moment now? A. Yes.

Q. May I have the agreement that you have there for the records of this court? Would you take it apart for me, sir?

A. I think it all goes together, doesn't it?

Q. Very well; that will be fine. And you don't mind me taking it? May this be marked for [95] identification?

(Testimony of C. L. Howard.)

(Whereupon the document was marked as Government's 18 for identification.)

Mr. Murlless: I hand you Government's Exhibit 18 for identification and will you characterize the documents as they appear in their order, sir?

A. Well, this is an escrow instruction and this is the original agreement, and this is a memo of the payments to be made on that.

Q. And are there, those three, is the first of those documents which you have stated makes up Government's 18 for identification, does it purport to bear the signature of Claude E. Spriggs?

A. Yes.

Q. And of any other person?

A. Of Evelyn Lee Spriggs, Howard and Howard.

Q. And you say it encompasses an escrow transaction, and, a transfer of real property to Mr. Spriggs to you and your wife?

A. That is correct.

Q. And do you, did you observe the signatures placed there?

A. I don't remember. I'm not positive that I did. That might have been my wife and I went to the title company one time and another at another time. [96]

Q. You did put yours there? A. Yes.

Q. That was the agreement under which it was transferred? A. Yes.

Q. The second was an agreement to convey?

A. That's correct.

(Testimony of C. L. Howard.)

Q. Will you state to the jury the legal description of the property if it appears in the second page, please?

A. Block 39, Churchhill Addition, city of Phoenix.

Q. May I move for the admission of this group of three documents as Government's 18 for identification?

Mr. Parker: If your Honor please, I should like to register an objection upon the ground that it is, the relevancy of this exhibit is not apparent, that on the further ground that no proper foundation has been established.

The Court: What piece of property is this?

Mr. Murlless: This is another of the pieces of property upon which depreciation was claimed, if your Honor please.

Mr. Parker: If your Honor please, do you mean '47? [97] A. Yes.

Mr. Parker: You mean this is a part of the Henshaw Road property?

Mr. Murlless: No, sir; one of the pieces of property upon which depreciation was claimed for 1947. It's a matter of identification, if your Honor please. Our problem has been identification of each of the items.

The Court: How many pieces do you claim were over-depreciated? Is this it?

Mr. Murlless: No, sir; it's another of the items.

The Court: I don't follow you. I have a form in the bill of particulars in the old case. It refers

(Testimony of C. L. Howard.)

to over-depreciation only on the Henshaw Road property.

Mr. Murlless: I think we ought to be able to identify each of the items, because the depreciation appears with respect to the single item on the Henshaw Road property in two entries, if I make myself clear; now, with respect to Government's 2 in evidence. I felt the necessity of identifying each of the pieces of the property that are shown depreciated there.

The Court: All right; admitted.

Mr. Murlless: What was the consideration shown? [98]

Mr. Parker: The exhibit speaks for itself in that connection.

The Court: He's already said \$10,000.

(Whereupon the documents were received as Government's 18 in evidence.)

Mr. Murlless: I don't like to differ, if your Honor please, but was it \$10,000 or \$10,500?

A. \$10,500.

Q. Thank you very much. Your witness.

Mr. Parker: No questions.

Mr. Murlless: May this witness, too, be excused, if your Honor please?

The Court: Yes.

Mr. Murlless: Mr. C. L. Sparks.

C. L. SPARKS

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Murlless): Would you state your name? A. C. L. Sparks.

Q. And what is your work, sir?

A. I'm the County Assessor of Maricopa County.

Q. And for how long have you been in that office? [99] A. Since January 1, 1951.

Q. And as such a custodian of certain records of the County of Maricopa, the State of Arizona?

A. That is correct.

Q. Required to be kept in your office as a matter of statute of the State of Arizona? A. Yes.

Q. You are the custodian in your office?

A. Yes.

Q. How long have you lived in the State of Arizona?

A. Lacking 18 days of being 37 years.

Q. And, sir, would you state if you have been requested to make a search of the official records in your office with respect to one Claude E. Spriggs? A. That is correct.

Q. And did you make such a search?

A. I did.

Q. And will you state to the jury the general, the period over which it extended and what was the nature of the search?

A. The, it extended from '45 up to '48 on all property assessed in his name and property sold

(Testimony of C. L. Sparks.)

during that period where the title had changed [100] from him to a purchaser.

Q. Each one of those items of information concerning the transfer or the assessment of property for a, tax purposes, are information that is maintained in your office as a matter of the usual course of the business of your office, is that correct?

A. That is correct; it reveals positively the assessed valuation and the transfers.

Q. And the identification of the property?

A. And the legal description, location and so forth.

Q. The location, too; it's an address?

A. Yes, sir.

Q. And in that connection with respect specifically to the year 1947, did you make a summary of your findings? A. I did.

Q. That came from your search?

A. I did.

Q. And did you bring the records from which that summary was made to Court today?

A. Yes.

Q. And are they these over here?

A. They are the same as those copied from those books which you have here. [101]

Q. And sir, and you stated that from your search you did make up a summary for the United States of the U. S. attorney and this Court.

A. That is correct.

Q. May I have that, please?

A. Do you want this, too?

(Testimony of C. L. Sparks.)

Q. Not at the moment. May this document be marked for identification, if your Honor please?

(Whereupon the document was marked as Government's 19 for identification.)

Q. I hand you Government's 19 for identification, Mr. Sparks, and ask you if that is the summary of your search which you have prepared for it?

A. That's right.

Q. And will you state for the jury again what it reflects?

A. It reflects the property owned by one Claude E. and Evelyn Lee Spriggs and the property sold during this period.

Q. And does it reflect the taxable value of the property? The tax value?

A. Taxes and assessed valuation.

Q. And it is a summary from the original records kept in the regular course of the business of your office and in your custody as their official custodian? [102]

A. This is a duplicate copy of the records revealed in the tax rolls certified by the Supervisors, computed IBM, certified back to the Treasurer's Office for collection.

Q. And you have brought the books where that summary came from and it is in Court?

A. That is correct.

Q. I move for admission into evidence, if your Honor please. That's 19, Government's 19 for identification.

(Testimony of C. L. Sparks.)

(Thereupon the document was handed to counsel for Defendant.)

Mr. Parker: If your Honor please, I must object to this exhibit upon the ground, first, that it contains a great many matters obviously not relevant to any issue properly before the Court here, and upon the second ground that apparently he is offering this record with respect to valuation of whatever property in there mentioned may be at all relevant and it is not, it is obviously incompetent evidence as to valuation, actual valuation; for the further reason that there are some typewritten documents containing some pencil additions thereto which have not been explained in any manner. It just simply is a shotgun proposition, relevant as a whole neither [103] in time nor subject matter to the issue.

The Court: What are you offering it for?

Mr. Murlless: To show what the group of pieces of property owned by this taxpayer were during 1947 to the end that allocations can be made amongst them in reference to Exhibit 2 of Government's in evidence.

The Court: What's that?

A. That's the income tax return, if your Honor is not complete in its reference to the individual pieces of property. They are not described except by such words as cement, cement, cement; one word.

The Court: I reserve ruling on the exhibit.

Mr. Murlless: Now, in this same connection,

(Testimony of C. L. Sparks.)

were you—will you state whether or not you did make up a property tax assessment only which is, reflects only those items of property on which there are improvements? A. I do have.

Q. And that is with reference to Government's 19 for identification; it's the property now only that upon which there were improvements that were taxable for that year, is that true?

A. Yes; identified under owner's name and assessments, numbers to be checked through the [104] tax rolls.

Q. And it doesn't have any reference in that next exhibit to the location or the street address?

A. No; it doesn't have any location, only the legal description according to lots and blocks, but no street address.

Q. And may this be marked for identification, if your Honor please?

(Whereupon the document was marked as Government's 20 for identification.)

Mr. Murlless: And I give you Government's 20 for identification, Mr. Sparks, and is that the statement of the improved real property?

A. That's put on one tax bill, the property owned, and assessed under the name of Claude E. Spriggs and Evelyn Lee Spriggs for 1947 showing the assessed valuation of the real estate and the improvements and personal property as the tax bills were billed to him from the Treasurer's Office.

Q. And it is only that upon which taxes are paid?

(Testimony of C. L. Sparks.)

A. Exempt pieces are left off because it is a summary of tax bill for '47.

Q. Any exemptions?

A. Well, according to this there is no [105] exemptions shown here.

Q. That's for pieces of property where there was a valuation requiring a tax?

A. I can't testify that they were paid by him. I don't know who paid it.

Q. Yes, sir; and it is the part of the official records or a summation of the official records which you have brought to cover it?

A. Can be identified as the same assessment. Numbers.

The Court: I suppose you have the same objection?

Mr. Parker: Yes.

The Court: You can cross examine later. We can call him at his office anytime.

A. Yes, sir; that's true.

Q. That's all.

The Court: Thank you, Mr. Sparks.

WILLIAM McRAE

was recalled as a witness on behalf of the Government and testified as follows:

Direct Examination

Q. (By Mr. Murless): Your name is William McRae? A. Yes. [106]

Q. You testified here yesterday? A. Yes, sir.

Q. You are the Assistant Director of Internal

(Testimony of William McRae.)

Revenue in the District and State of Arizona?

A. That is correct.

Q. You brought some returns with you, didn't you, sir? A. Yes.

Q. You testified at some length with Governments Exhibit 2 in evidence? A. That's right.

Q. And in that connection, sir, did you state what the—I wondered if you stated whether or not that return reflects of the taxpayer rendering it that he had, he received income from taxable gains on the sale of capital assets; does it reflect any income from taxable gains on the sale of capital assets? A. No; it does not.

Q. And it is the return of Claude E. Spriggs and re the State of Arizona? A. Yes.

Q. That's the return about which you testified yesterday? A. That's right. [107]

Q. Now, does it have an entry there with respect to depreciation claimed on assets held for rents, that is, real property rentals?

A. Yes, it has a schedule of depreciation claimed.

Q. And does it allocate that to different items in a lump?

A. Yes, there is four items named on which depreciation was claimed.

Q. And are they described, sir?

A. The first item is referred to as frame and date acquired 1945, cost, \$5,500, depreciation claimed \$412.50.

Q. The second.

(Testimony of William McRae.)

A. Marked "cement, cost \$20,000, depreciation claimed, \$2,000."

Q. And the third?

A. Also marked "cement—cost of \$10,500, depreciation claimed \$1,050."

Q. And the fourth?

A. Also marked "cement, cost \$20,000, depreciation claimed \$2,000."

Q. Is the fourth item exactly the same in type, or is the second item? A. Yes.

Q. For how long does it state that those assets, [108] if they appear on two different lines, how does it state it got in the hands of the taxpayer, Claude E. Spriggs?

A. The date acquired is not shown under either item, but in item two the schedule indicates that it had a remaining life of eight and a half years, whereas in item four the remaining life was nine years.

Q. Different. It indicates that there are different parcels there? A. Yes.

Q. In that same connection you brought with you to Court and this identified here the documents that you brought as official documents of your office, Government's Exhibit 1 for identification. Does that also reflect a list of depreciable or depreciation items?

Mr. Parker: Object to asking on a document not in evidence.

Mr. Murlless: Does it?

The Court: Wait a minute.

(Testimony of William McRae.)

The Court: Why don't you want to put it in evidence?

Mr. Murlless: I will, sir; I wanted to wait to see if it was really relevant. I'll offer it in evidence, if your Honor please. [109]

(Thereupon the document was handed to counsel for defendant.)

Mr. Parker: Object to it on the ground that it appears to be a return for 1946, a year not in issue in this case.

The Court: What is your point?

Mr. Murlless: If your Honor please, it reflects a different type of, a different set of items of depreciation. I would like to make that point; I'll make another one if that's not adequate.

The Court: You mean inconsistent statement about the same real estate?

Mr. Murlless: Yes, sir.

Mr. Parker: I think he means what some additional real estate not on it later. It's not the same list. It has no probative force, not only not in force and not relevant.

Mr. Murlless: It makes an inconsistent statement, but second, that he's to identify the items that are related in Government's 2 again. And thirdly, that it shows the situation of a man who was in the business of making money in rental houses and in the transaction in the real property.

The Court: Admitted.

Mr. Parker: I neglected another ground, and

(Testimony of William McRae.)

[110] that it relates to a charge of which the defendant has heretofore been exonerated.

The Court: Admitted.

(Whereupon the document was received as Government's 1 in evidence.)

Mr. Murlless: I hand you Government's Exhibit 1, Mr. McRae. Do you recognize it in testimony yesterday? A. Yes.

Q. You stated that it does contain representations with respect to items of capital assets upon which depreciation should be and was in that return claimed? A. Yes.

Q. And will you read those to the jury item by item, sir?

A. First, item of depreciation marked "adobe." "Dated acquired, 1945; cost, \$7,500. Depreciation claimed, \$375.00." Second item marked "frame." "Acquired 1945; cost \$5,500; amount of depreciation claimed, \$550." Third item marked "cement." "Date acquired, 1945; cost, \$20,000; amount of depreciation claimed, \$1,750."

Q. The fourth item is marked "Cement"?

A. "Acquired 1939; cost \$2,500; amount of depreciation claimed, \$1,250." Fourth item also [111] marked "cement—date acquired, 1944; cost, \$10,500. Amount of depreciation claimed, \$1,050."

Q. Now, in that same connection you brought another instrument with you, sir? You brought another instrument with you, that—it's number 8—I hand you Government's 3 for identification and

(Testimony of William McRae.)

ask you if that, too, is an official document of the Internal Revenue service. A. It is.

Q. And did you testify in its connection to some degree yesterday? A. Yes.

Q. And the purchase—it purports to be the income tax return for one Claude E. Spriggs?

A. Yes.

Q. We move for its admission in evidence.

The Court: What year?

Mr. Murlless: 1948. But if you'll recall yesterday we clipped two together and there is another item there. Would you mention it?

A. There is an amended return for 1948 attached to the original return.

Q. Thank you, sir.

Mr. Parker: If your Honor please, objection was made to it on the ground that there is no proper foundation laid and it is not relevant to [112] any issue in this case; that it has no relevancy whatsoever to the matter. It's a return and amended thereto, apparently made the year after, and no probative force. Wholly incompetent.

The Court: What did you claim for it?

Mr. Murlless: It is in the same manner, if your Honor please, to the other item that is Government's Exhibit 1 that was just admitted. It is at this point less appropriate, perhaps, because we had Government's 1, and we have had that aid in identifying the individual pieces.

The Court: Cumulative?

(Testimony of William McRae.)

Mr. Murlless: Yes, sir. It is at this time rather cumulative.

Mr. Parker: I object.

Mr. Murlless: May I ask another opportunity to examine this witness, if your Honor please? That's all at this time.

Mr. Parker: May I ask a question at this point? How long have you known Claude Spriggs?

A. Well, at least 30 years.

Q. At least 30 years? Did you know him as a boy in Safford? A. Yes.

Q. And you have known him since he was just a small chap? [113] A. That's right.

Q. Have you been friends during all of those years?

A. Yes; there's never been anything that would have been anything of an unfavorable nature. I have never had dealings with him except in the office.

Q. That's all.

Mr. Murlless: Thank you, sir. We may call this witness again. Mr. Frisinger.

LOWELL FRISINGER

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Murlless): What is your name, please, sir? A. Lowell Frisinger.

Mr. Parker: Pardon me; I didn't get the name.

(Testimony of Lowell Frisinger.)

Mr. Murlless: Would you spell it?

A. F r i s i n g e r.

Q. What is your work?

A. I am attached with the Engineering and Valuation Section of the Internal Revenue Service, in Los Angeles.

Q. And for how long has that been your work?

A. For five years. [114]

Q. Do you have an educational background preliminary and prerequisite to obtaining this type of work?

A. Yes; for approximately one year with the University of California.

Q. And is a part of the work, do you often make maps or drawings of lots, pieces of ground, or buildings?

A. We do on every valuation that we make.

Q. Did you have any reason to be requested—you have done that for five years? A. Yes.

Q. Did you have occasion to be requested to make a schematic drawing as opposed to a finely scaled drawing on a piece of ground located at 2008 East Henshaw Road? A. Yes. [115]

Q. And when did you do that, sir?

A. I did that Tuesday.

Q. Did you make a drawing of it?

A. Yes, sir.

Q. That is, this Tuesday of this last week?

A. Yes, sir.

Q. And you did not have an opportunity, as I understand it, to measure and scale it off, and

(Testimony of Lowell Frisinger.)

this is not that type of drawing, a schematic for the location of certain improvements on the ground?

A. Yes.

Q. May I see it, please, sir. Now, it is to be marked for identification, if your Honor please.

(Thereupon the document was marked as Government's 21 for identification.)

Q. You have also, sir, sat in the Court for yesterday and today and heard the testimony that have been from the witnesses chair there in this case?

A. I have.

Q. Now, in this connection, will you state to the Court, generally, and to the jury, generally, not what it says on there, but what you have endeavored to reflect. Just the general, [116] not what it says, but what that thing is?

A. The outside rectangular is the two lots, the Lots 47 and 48 of the tract. This is a store. This is a small shop, and this is, that is marked "restaurant".

Q. If I remember, sir, if I may, it is a schematic drawing of what is on that premises up there right now, or was Tuesday when you went out there to look at it?

A. With the exception of a building here, that looks as if it was being constructed at the present time.

Q. The building is not completed out there, that is not on this schematic drawing?

A. No, it isn't.

Q. This intends to be at, to scale?

(Testimony of Lowell Frisinger.)

A. Roughly, no, it isn't.

Q. It is to a rough scale?

A. Yes, to a rough scale.

Q. I move for a submission in evidence, if your Honor please.

(Thereupon the document was handed to counsel for defendant.)

Mr. Parker: May I ask the witness a question or two on voir dire? Mr. Frisinger, I'd like to ask you if it is not a fact that just north of [117] this unit which you have labeled number 7, there is a storeroom here?

A. Yes, sir.

Q. That is not shown? A. Yes, sir.

Q. And north of the storeroom there is a wash-room, that is not shown on your schematic map?

A. I can't answer that.

Q. You can't answer that? A. No, sir.

Q. You mean, you didn't pay that much attention?

A. In '47 there was only the thirteen units, the store, the restaurant and the shop and the others was immaterial.

Q. Were you producing or attempting to reproduce 1947 conditions there? A. Yes, sir.

Q. Although you never saw it until last Tuesday? A. Yes.

Q. Tuesday of this week? A. Yes.

Q. Let me ask you one further question. In the lower left-hand corner, you have designated [118] a rather narrow rectangle called "shop"?

A. Yes, sir.

(Testimony of Lowell Frisinger.)

Q. Now, isn't it a fact that that shop extends a considerable distance over the next lot, presumably it would be Lot 49, if these are numbered consecutively, in that direction?

A. It probably does two feet, more or less.

Q. You think only two feet?

A. I think so.

Q. You didn't draw that part in?

A. No, sir, I did not.

Q. You just cut off at the boundary line of Lot 48; you just cut off that at that point?

A. Yes, sir.

Mr. Murlless: Will you take your pencil, sir, and generally put on to this the two structures about which you have been examined by Mr., by counsel, and with respect to which you stated are not there, in a general way, with your pencil?

A. These are to the north of Lot 7, and—I can't draw here.

Q. Use the blackboard.

A. As to the second building that he spoke about, I am not so sure about that. I don't know.

Q. You don't know whether you could put that [119] in there schematically and to any scale?

A. Would you put one in there, no.

Q. Does it now represent a schematic drawing of what is there, generally, within your observation of the last week?

A. I believe so.

Q. Move for admission in evidence, if your Honor please.

Mr. Parker: Your Honor please, I object to it

(Testimony of Lowell Frisinger.)

as not relevant to any issue in the case. The witness states he did not see the place the first time until Tuesday of this week, which would have been the 27th day, or, but at any rate, Tuesday of this week. The issue here is what the condition was in 1947, your Honor.

The Court: I don't understand that it is the issue. The bill of particulars said, "Depreciation, overstatement, consisted and overstatement of the costs, and false representations of the cost of this property".

Mr. Parker: It certainly has no bearing on that issue. For that reason, I respectfully——

The Court: It is like taking a picture. It is admitted provisionally.

Mr. Murlless: Would you put that away. It needs to be marked here first, and will you [120] prepare to put it up there on the blackboard, sir.

The Court: What does that have to do with the overstatement of costs?

Mr. Murlless: I need some place to identify each one of these items by the workmen that worked on them.

The Court: What does that have to do with the costs?

Q. Because they are going to testify as to the construction costs.

The Court: He didn't purchase them.

Mr. Murlless: No, most constructed between '45 and '47, I think all, but the ones this gentleman left off—now, it has been placed on the blackboard.

(Testimony of Lowell Frisinger.)

That I presume to the north, which is in a northerly direction? A. Yes, sir.

Q. And that to the south, a southerly, and will you show to the jury what generally is there representing Henshaw Road?

A. This is Henshaw Road back here.

Q. This is, I understand it, just a lay-out of Lots 47 and 48, of what addition?

A. It is Eubank Addition, Block 2.

Q. An addition to the City of Phoenix? [121]

A. Yes, sir.

Q. May this witness be excused—may we recall this witness?

The Court: Mr. Parker is entitled to cross examine.

Mr. Parker: None.

CHARLES E. DYER

having been first duly sworn, took the stand and testified on behalf of the Government, as follows:

Direct Examination

Q. (By Mr. Murlless): And will you spell your name, please? A. Dyer.

Q. And your first name? A. Charles.

Q. And what is your work, sir?

A. At the time, a contractor.

Q. All right, sir, you are speaking of what time, 1947? A. 1947.

Q. And what kind of contracting did you do?

A. General building.

(Testimony of Charles E. Dyer.)

Q. Do you know the defendant, Claude S. Spriggs? [122]

A. Yes, sir.

Q. And in what connection, if you will tell the jury?

A. Well, I did a little work for him.

Q. And you have observed there to your right up against the blackboard a schematic picture of Lots 47 and 48? First, may that be stricken, and where did you do that work for him, sir?

A. On the store building for, and worked on some apartments on Henshaw.

Q. Henshaw Road?

A. Yes, sir.

Q. About what address on Henshaw, if you can recall?

A. About 20th Street and Henshaw.

Q. Near 20th Street and Henshaw?

A. Yes.

Q. To your right there you will see a piece of paper which may or may not reflect to you a schematic drawing of some property on Henshaw Road; do you recognize it?

A. Yes, it is a pretty good rough sketch of it.

Q. And in that connection, can you point out to the jury the parts of any buildings that [123] are on Lots 47 and 48 of Eubank Addition on Henshaw Road that you helped to put up, if any?

A. I helped build a store building there and I worked on three of those apartments. I think the back three.

Q. I believe it was.

A. North.

Q. On the north end of the west side. What are they numbered?

A. 11, 12, 13.

(Testimony of Charles E. Dyer.)

Q. Will you step back and point more particularly so that the jury can see—those back three on the west side and the store building.

A. That is correct.

Q. Can you recall of what part of that building did you take apart? What particular part was yours?

A. Well, I built the store building complete.

Q. What was it built of?

A. Cement block.

Q. Any connection with the three buildings back beyond or in the back there, what part did you take in the building of it?

A. Well, sir, I'll tell you. That's kind of dull in my memory. I don't remember what I did, but they are block construction, too. [124]

Q. Did you build them or have a part in it?

A. I worked on them, yes, but I don't remember what part of it I did do.

Q. Did you have occasion about the time you had finished the store building—do you remember when you did work on the store building?

A. About the third month of 1947.

Q. It was after that work on the three back buildings? A. Yes, sir.

Q. When would it have been when you worked on the apartment buildings?

A. It was just after the store was built.

Q. Late in '47? A. Yes.

Q. In that connection, had you ever had nego-

(Testimony of Charles E. Dyer.)

tiation with Mr. Spriggs over the building of those back three apartment buildings?

A. Yes, we, I tried to contact them.

Q. Will you state to the jury what your offer in that regard was?

A. It seems to me like the best I can recollect, I offered to build them for \$1500.00 a unit.

Q. Was that to provide both the labor and materials? [125] A. Yes, sir.

Q. In that connection, were you given the contract? A. No.

Q. Do you know how much they, the plans were that they should cost after you had been refused the contract for \$1500.00 for their construction?

A. No, I don't know what the actual cost was on them.

Q. But you did observe the construction of them? A. Yes.

Q. The commencement of it? A. Yes.

Q. And in that connection, why didn't you observe the completion of them, if you will tell the jury, to the best of your recollection?

A. Claude and I had a little difficulty there and I quit.

Q. You stated that you made a proposition that you would build them for \$1500.00, over that, how much did you conceive would be your profit in that matter?

Mr. Parker: Objection.

The Court: Objection sustained.

(Testimony of Charles E. Dyer.)

Mr. Murlless: A proposition was refused, [126] though, at \$1500.00?

Mr. Parker: Object; it has been answered and asked, and answered before.

Q. Did you observe the completion or see what they looked like after they were completed in general? A. Yes.

Q. What did they look like, if you will describe them for the jury?

Mr. Parker: If your Honor please, may this be a little more specific. I don't know which buildings he is talking about or when. His condition doesn't indicate, and I object to it on the grounds no foundation has been laid.

A. The west inside piece; I have papers——

Mr. Murlless: Will you describe the general construction, the method you went to construction, and what they looked like when they were completed?

A. Block construction, and they have a flat roof, fire wall.

Q. A flat roof?

A. And they are what I call a kitchenette apartment. They have a shower, toilet, and a kitchenette, and one room, bedroom.

Q. And one room, what was it, a combination [127] living room—sleeping room, or bedroom?

A. Yes, a combination living room and bedroom.

Q. And that is with respect to each one of the back apartments? A. That is right.

Q. Could you—could that be stricken in connec-

(Testimony of Charles E. Dyer.)

tion with the building of the store building. Do you know how much it cost Mr. Spriggs to build?

A. I don't say exactly, no.

Q. How much did you receive for your part of the construction of it?

A. I think I drew around \$2200.00.

Q. In that connection, was that payment for services and for materials, too?

A. That was labor and material.

Q. Material and services in that regard?

A. Yes, sir.

Q. You received \$2200.00 for payment—store building?

A. That's the best I can recollect, and I have no record.

Q. Did he provide any part of the materials?

A. No.

Q. And that was at the completion of the [128] store?

A. That is right.

Q. And is that the front building?

A. It is the store building.

Q. Left or west? A. Yes.

Q. Will you tell the jury the dimensions of that, to the best of your knowledge?

A. It is 22 by 35, was my recollection.

Q. Will you step up to that schematic drawing, sir, and if you have no pencil, put the dimensions on that store building.

A. 35 is the long axis, and the 22, the east-west axis.

Q. And within your aid of the construction of

(Testimony of Charles E. Dyer.)

the units 11, 12 and 13 in the back, were they also the same depth as the store? A. 22 feet.

Q. All of those about 22 feet deep?

A. Yes.

Q. And were the, after you observed those apartments after they had been built, were they plastered inside? A. I don't think so.

Q. Have a ceiling in them?

A. Not at that time. [129]

Q. Will you show generally what the shape and the form of the roof was that was put on those. Will you step down there and make a drawing of it. I think the chalk is——

A. I have got the chalk. Well, let's see. Come down here. (Drawing.) A fire wall up here (indicating).

Q. And that is what you mean by a slant roof, sir? A. That's it.

Q. Do you have any other name for that type of roof?

A. Well, some of them call it flat, some shed, and some of them call it——

Q. Thank you very much. Your witness.

Cross Examination

Q. (By Mr. Parker): Mr. Dyer, where do you live at the present time?

A. Palmdale, California.

Q. And how long have you been living in California? A. Oh, approximately three years.

Q. Approximately three years?

(Testimony of Charles E. Dyer.)

A. Yes, sir. [130]

Q. And this construction work that you did was approximately seven years ago?

A. That is right.

Q. Now, Mr. Dyer, did you at that time, did you say you were in the contracting business?

A. That is right.

Q. Were you at that time a contractor, licensed by the State of Arizona? A. Yes, sir.

Q. And I believe you stated that this store room was 22 by 35 feet in dimensions?

A. To the best I can remember.

Q. It had an 11 foot ceiling, did it not?

A. It either had a 10 or 11 foot ceiling.

Q. When finished, plastered?

A. The ceiling was plastered, yes.

Q. It was? A. I don't think so.

Q. You are not sure?

A. I am pretty sure, we didn't plaster them, he did the ceilings.

Q. It was somebody else plastered them after you left the job, that this was done? A. Yes.

Q. Cement floor?

A. That is right, red. [131]

Q. What was that?

A. Red colored floor.

Q. Now, Mr. Dyer, did you do any painting on that building, on that store building?

A. Yes, sir.

Q. You did? Did you furnish the light fixtures?

A. No, I think there was a stipulation in there

(Testimony of Charles E. Dyer.)

that the owner furnishes his own fixtures. We rough wired them.

Q. Did you have a written contract for the construction of that store building?

A. If I had, I can't find it.

Q. Did you look for it? A. I sure did.

Q. What was your recollection, was it in writing or not?

A. I don't know whether it was or not.

Q. Did Mr. Spriggs furnish any of the plumbing? A. I don't think so.

Q. You don't remember for sure about that, do you? A. No.

Q. Did you put in sewer connections?

A. Not me personally, no. [132]

Q. Did Mr. Spriggs do that?

A. No, Mr. Whitaker did that.

Q. Did you pay for it?

A. The two of us paid for it.

Q. You mean hooking it up to the sewer line?

A. Now, no, we stubbed it out of the building.

Q. Mr. Spriggs did that as far as you know?

A. Somebody did.

Q. Isn't it a fact that if the walls were plastered on the inside, somebody else besides yourself did it, you wouldn't know who?

A. No, I wouldn't.

Q. Isn't it a fact, also, Mr. Dyer, that Mr. Spriggs did the painting or had it done?

A. Well, now, I did part of the painting.

Q. Yourself, personally?

(Testimony of Charles E. Dyer.)

A. Yes, personally, myself.

Q. Part of it? A. The outside of it.

Q. How is that?

A. The outside of the store, and the apartments.

Q. And you know that Mr. Spriggs did the rest?

A. No, I don't know that he did. [133]

Q. You don't know who?

A. No, I don't.

Q. Nor how much it cost?

A. That is right.

Q. Now, Mr. Dyer, this store building which you say was 22 by 35, or a total of 770 square feet?

A. That is the best of my recollection, yes.

Q. Isn't it a fact that in 1947 that type of construction was costing an average of approximately \$7.00 a square foot, or \$8.00?

A. No, no, sir.

Q. How many, how much would you say?

A. That is, I am speaking of the average cost of that type of construction on the square foot basis with the eleven foot ceiling and at least in the shape you saw it when you left it.

Mr. Murlless: I object unless he qualifies that with "if you know".

Mr. Parker: \$6.00 a square foot.

A. Yes, you could make good money at \$6.00.

Q. You think that would be a reasonable cost price or contract price?

(Testimony of Charles E. Dyer.)

Mr. Murless: The question has been asked [134] and answered.

The Court: Overruled.

Mr. Parker: Could you make money at \$6.00?

A. You sure could.

Mr. Murless: What?

A. You could make money at \$6.00.

Q. In other words, you think that would have been a fair, reasonable price at that time for that type of construction? A. That is right.

Q. Then at \$6.00 per square foot, 770 square feet, at \$4,670.00, would it?

A. That's at \$7.00 a square foot.

Q. Okay, sir, did you take a contract on apartment units you refer to?

A. A company contract?

Q. Yes, sir. A. No.

Q. You just worked on those, as I understand it?

A. That is right; I was running the job for Mr. Spriggs.

Q. And Mr. Spriggs was paying you and footing the bills? A. That is right.

Q. And you left that job somewhat before it was finished? [135] A. Yes.

Q. And at the time you left it, there was no roof on it?

A. I think the sheeting, I think the rafter or ceiling joists and sheeting was on them.

Q. But the roofing? A. No.

Q. The doors weren't hung? A. No.

(Testimony of Charles E. Dyer.)

Q. Were the plumbing fixtures all in?

A. No.

Q. In other words, you left quite a while before the job was over?

A. I left, you might say, when I got the shell up.

Q. You got the shell up?

A. Outside walls and the rafters and sheeting; I think that's when we disagreed and the roof wiring.

Q. And you and Mr. Spriggs disagreed?

A. Yes.

Q. You had a falling out of some kind? We are not interested in that.

A. We disagreed to disagree.

Q. And did he pay you for your labor?

A. Yes. [136]

Q. Do you remember how much he paid you for your labor on the three units?

A. No, I don't, because he was paying so much an hour.

Q. And he was supplying the materials?

A. That is right.

Q. And also paying other workmen on the job, or were you the only one there?

A. Well, now, there is a little sticker in there.

Q. What do you mean by that?

A. I paid off an electrical bill on that of \$75.00, so somewhere in the deal I either agreed to purchase the labor for so much, I forget, anyway, I had to pay the electrical bill.

Q. My question, Mr. Dyer, was in reference to

(Testimony of Charles E. Dyer.)

whether there were other workmen on the job and who paid them?

A. One of them I paid, that was on contract.

Q. The electrician you paid?

A. That is right.

Q. \$75.00 and Mr. Spriggs reimbursed you, didn't he?

A. Not that I know of.

Q. You claim that he still owes you that?

A. Yes, sir, I still do. [137]

Q. He paid you otherwise, though, didn't he?

A. Yes.

Q. Outside of the electrician, he paid any other workman that worked on the building, as far as you know?

A. That is right.

Q. Did you just volunteer to pay the electrician?

A. No, sir, I was forced to pay it.

Q. You were forced to pay it? That is all, Mr. Dyer. Thank you.

The Court: How many more witnesses do you have?

Mr. Murlless: Three, four, or five.

The Court: Long or short?

Mr. Murlless: Short. The first is particularly short.

The Court: How about the rest?

Mr. Murlless: A couple are relatively long if it works out in my expectations.

The Court: You know, tomorrow is Friday and next day is Saturday.

Mr. Murlless: I was going to try to finish this evening.

The Court: Recess. [138]

(Thereupon the Court recessed at 3:35 o'clock p.m.)

(The roll call of the jury having been waived, and all persons previously mentioned being present, the Court reconvened at 3:50 o'clock, and continued as follows:)

Mr. Murlless: Mr. Charles Mathus.

CHARLES A. MATHUS

having been first duly sworn, took the stand and testified on behalf of the Government, as follows:

Direct Examination

Q. (By Mr. Murlless): I understand your name is Charles A. Mathus? A. Yes.

Q. M a t h u s ? You are a licensed building contractor? A. Yes.

Q. What was your work in 1945?

A. I was a carpenter.

Q. How long have you lived in Arizona?

A. Since '37. [139]

Q. All this in the City of Phoenix?

A. Yes, sir.

Q. And in connection with your work, do you know the defendant Claude S. Spriggs?

A. Yes, sir.

Q. And in what connection?

A. Well, I did some building, I built three little units for him back in '46 or '47, I don't remember the exact year.

Q. And where were, was that building done?

(Testimony of Charles A. Mathus.)

A. Just east of 20th on Henshaw.

Q. Which side of the street? A. North.

Q. And to your right there, you will find a schematic drawing of a group of squares, does that call to mind anything in connection with the building that he did?

A. Yes, that's similar to the layout.

Q. In that connection, which, do you recognize the squares as schematic of and representing the units there? A. Yes.

Q. And what of those units did you build?

A. According to the number is 8, 9 and 10.

Q. Where?

A. Next to the store building. [140]

Q. Would you point them out?

A. 8, 9 and 10 (indicating).

Q. When did you do that building?

A. I couldn't tell you the exact time, but in '46 and '47.

Q. Under what kind of arrangements or contract was it done?

A. We had a verbal agreement.

Q. And did you execute this verbal agreement?

A. Yes, sir.

Q. And both you and Mr., the defendant, Mr. Spriggs, did operate under a verbal agreement that was completed about the date and time you mention, is that right? A. Yes.

Q. Under that connection, what did you do under that agreement?

A. I put up the building. In other words, the

(Testimony of Charles A. Mathus.)

footing, the floor and the frame work inside, we put up two by four framework inside, we put that up, I believe we put paper on the studs and the wire. We couldn't, if I recall, we couldn't have gotten metal lathe. We used heel screen for lathe. I laid the blocks and put on the roof.

Q. And did you make—— [141]

A. I didn't do the plastering. There was another party did the plastering.

Q. Did you make an estimate of what that could, would cost? A. Around \$3,000.

Q. For labor and materials? A. Yes.

Q. With the exception of plastering?

A. Yes.

Q. You put what the plaster went on?

A. That's right.

Q. In that connection, did you complete that arrangement under the verbal contract?

A. There is one thing that isn't clear in my mind, is to whether I put in the kitchen cabinets or not.

Q. You are not certain about the kitchen cabinets? A. No.

Q. That's been some time ago? A. Yes.

Q. In that connection was \$3,000 due?

A. Within the neighborhood of that. It could possibly have been a little more. [142]

Q. For three units? A. That's right.

Q. That was the aggregate for three units?

A. Yes.

Q. Approximately a thousand dollars apiece?

(Testimony of Charles A. Mathus.)

A. Yes.

Q. For labor and materials?

A. That's right.

Q. Thank you very much; your witness. [143]

Cross Examination

Q. (By Mr. Parker): Mr. Mathus, I understand that you did not do the plastering and that according to your present recollection you are not sure that you did the kitchen cabinet work?

A. I don't recall if I did or not.

Q. Did you do any painting?

A. It seems to me the plaster that went on the wall was colored plaster, but I don't recall that.

Q. Any woodwork at all in the building?

A. I don't think I did anything.

Q. No painting? A. I don't believe so.

Q. Did this sum which you mentioned include the furnishing of all of the plumbing fixtures such as the drainboard and kitchen sink and——

A. Mr. Spriggs furnished all the material.

Q. He furnished all the material?

A. Yes.

Q. And the figure that you mentioned has to do with labor?

A. No; the labor came out of the estimated price.

Q. That was an estimated price, but you didn't contract with him to furnish any materials?

A. No. [144]

Q. I believe you also stated at that time the

(Testimony of Charles A. Mathus.)

World War II wasn't too far distant at that time—were there shortages of materials?

A. Very short, yes.

Q. Was there a black market in materials in this area?

A. Well, there were, all right. There was a few selling over standard prices all right. It was hard to get good materials.

Q. And it was very difficult to get good materials and isn't it true, Mr. Mathus, that small contractors or property owners building at that time, and particularly Mr. Spriggs, you got whatever you could get wherever you could get it—isn't that true?

A. That was about the way it was at that time.

Q. At whatever price you were required to pay to get it at the time?

A. Most of the prices were general, that's right. Of course, a person needed some kind of a material, maybe a small quantity, might be willing to give over market price. But they watch it pretty closely.

Q. You say you couldn't get metal lath, so you used some kind of chicken wire?

A. I called it hardware cloth. About half-inch [145] mesh, I believe. Hardware cloth.

Q. Do you happen to know whether or not it is a fact it, that that wire which you used there as make-shift actually cost considerably more than metal lath?

A. I think it did cost a little more.

Q. Now, Mr. Mathus, on this job there, how

(Testimony of Charles A. Mathus.)

would you class that construction with regard, I mean, when the thing was finished, with regard to whether it was first, second, third, fourth or fifth class?

A. It was built cheaply. I'd say it was about a third-class building.

Q. Now, from your experience in this building is it not a fact that buildings constructed as this one was would have a shorter life than a piece of good construction?

A. Well, naturally, if you get shoddy materials you don't have quality.

Q. And isn't it a fact that that type of building deteriorates or depreciates much faster than a piece of good construction?

A. Well, it would be my opinion.

Q. Now, didn't the shortage of materials in some particulars affect even the normal building procedure there as, for instance, weren't there [146] times when you couldn't get cement blocks, when you should have had them, and had to get the cart before the horse?

A. Yes; I had that trouble several different times. Go ahead and put up framework, which we did on this job; put up framework.

Q. When actual sound business construction you would put the other up first?

A. That's right; in order to speed progress.

Q. Late in the construction did you have occasion to concern yourself with whether or not you were staying within your estimated costs to him?

(Testimony of Charles A. Mathus.)

A. I found myself running over.

Q. And in that connection what did you do?

A. Well, the last couple of weeks I worked for free.

Q. Because you were getting over the \$3,000 mark that you had estimated on the three units?

A. That's right.

Q. Thank you very much.

The Court: That's all.

Mr. Parker: As a matter of fact, wasn't the figure nearer \$3,400 that you estimated?

A. I couldn't recall.

Q. Possibly thirty six? [147]

A. I don't think that much. I believe if it would have been that high, I would have had 35 in mind rather than \$3,000.

Q. But it might have been four?

A. It could have been better than \$3,000.

The Court: That's all, I think.

Q. Could this witness be excused?

The Court: Yes.

Mr. Murlless: If your Honor please, at this time, we move for the admission of Government's 1 and 3 at this time.

Mr. Parker: Same objection.

Mr. Murlless: Mr. Sparks, please—or, Mr. McRae.

WILLIAM McRAE

having been previously sworn, retakes the stand and testified on behalf of the Government as follows:

Direct Examination

Q. (By Mr. Murlless): I think in this regard, from Government's 1 in Evidence, you did read the depreciation schedule in the 1946 return?

A. That is right.

Q. How many items is it comprised of, sir?

A. Five in connection with Government's 3 in Evidence.

Q. Will you read the depreciation schedule in the 1948 return? A. Three items.

Q. What are they?

A. First one is kind of property cement, year acquired 1944, cost \$10,500, depreciation claimed, \$1,050.00. Next, cement, acquired 1945, cost \$20,000.00, depreciation claimed \$2,000. Third item, cement, year acquired 1945, cost \$20,000.00, depreciation claimed \$2,000.

Q. Now, will you look at the amended return, first, if you will, sir, what was the date of the figure of the original return for 1948?

A. January 24, 1949.

Q. Was there any tax paid on that return?

A. No.

Q. Will you look for an amended return for 1948, sir? A. Yes.

Q. And what date was it filed?

A. January 16, 1950.

(Testimony of William McRae.)

Q. And will you look at the depreciation schedule and read it to the jury?

Mr. Parker: I object. It is not within the [149] issues, and particularly this amended return.

The Court: What do you claim for it?

Mr. Murlless: Because the \$20,000 item has been dropped out, if your Honor please. It shows intent.

The Court: What?

Mr. Murlless: Knowledge and intent, and for that purpose alone, if your Honor please.

The Court: What item are you trying him on?

Mr. Murlless: \$20,000 item which was duly indicated on 1947 return.

The Court: Dropped out, you claim, in a later return of 1948?

Mr. Parker: If your Honor please, may I say only this, and to point up the views of this. February of 1949, the Internal Revenue Service provided an arbitrator; their idea of what the depreciation tax schedule should be, and this taxpayer tried to follow the pattern he laid down, and now because we filed a return, an amended return, attempting to go by this, he is to be charged with fraud when he was trying to follow their instructions.

The Court: Admitted.

Mr. Murlless: May this witness be excused?

The Court: Wait a minute.

Mr. Murlless: Pardon me.

Mr. McRae: Want me to read the depreciation schedule?

(Testimony of William McRae.)

The Court: He is through with asking questions.
Cross examination. Aren't you through?

Mr. Murlless: I can do it at a later time.

Mr. Parker: No questions.

Mr. Murlless: I am through with him now, if your Honor please. Thank you, sir.

JAMES STRUCKMEYER

a witness of legal age, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, took the stand on behalf of the Government and testified as follows:

Direct Examination

Q. (By Mr. Murlless): And will you spell your full name, please? A. S t r u c k m e y e r.

Q. What is your work?

A. I am a lawyer.

Q. And for how long has that profession occupied you? [151]

A. About fifteen years.

Q. Where do you live? A. In Phoenix.

Q. And for some years? A. Since '41.

Q. In this connection, in connection with your work, do you know the defendant Claude S. Spriggs? A. I do.

Q. And over what period of time does that acquaintanceship extend?

A. I think I may have met him before, but I met him roughly in 1943 when he came to my office and was an associate.

(Testimony of James Struckmeyer.)

Q. And you did know him, then, from then until——

A. Now.

Q. And in connection with the defendant Claude E. Spriggs, will you state whether or not you ever had a conversation with him with respect to the methods of reporting or failing to report income?

A. I did as to the method of reporting income.

Q. In that connection, in general if you can, and will you characterize, or the conversation [152] when did it happen and who was present?

A. Mr. Spriggs and I were associated. We had some conversations in my office or perhaps in his office; they were adjoining. I remember one such conversation that occurred in company with Mr. Harold Whitney, a lawyer, while we were crossing the street. The, at that time, I was complaining because I had to pay an income tax. Mr. Spriggs stated that there was no reason you should pay an income tax. Words to this effect, that a person would be foolish to pay an income tax.

Q. And did he state why?

A. Yes. I am not sure that he stated in those words why. He either stated or intimated it was a matter of taking the proper returns on your income, and that if you owned property, the depreciation allowed, I never quite understood it, would eat up the income so you wouldn't have to pay a tax.

Q. Made your depreciation great enough, you could make more than your income, and wouldn't pay a tax?

A. Yes.

(Testimony of James Struckmeyer.)

Q. Thank you very much.

Mr. Parker: About how long were you and [153] Mr. Spriggs associated in the practice of law?

A. Three or three and a half years.

Q. When was it terminated?

A. About 1946 or 7.

Q. You don't know the exact date?

A. No, I do not, I believe it was the fall of '46. I believe he came to the office in the fall of '43, but I don't know the exact days.

Q. Then in all probability, the conversations you have been relating, the conversation you related occurred in '46 or sometime prior to that time?

A. '45, '46, '47; I believe, Mr. Parker.

Q. Was he——

A. We met quite often, I am sure, during '47, whether he was with me in the office or not, I don't know.

Q. Now, Mr. Struckmeyer, what was the occasion of your terminating the relationship with Mr. Spriggs in the practice of law?

A. I think it was by mutual agreement, Mr. Parker. He was very busy with his property. More busy with the property than he was with law, and he left our office, I think, by mutual agreement.

Q. Was it the fact you had need of a lawyer [154] who could devote, or would devote his full time to law, and Mr. Spriggs wasn't in that position, and you, therefore, by mutual consent, terminated the relationship? A. Yes.

Q. Got another lawyer that could do it?

(Testimony of James Struckmeyer.)

A. Yes.

Q. Just prior to the termination, Mr. Spriggs wasn't doing, in the practice?

A. No, he was busy with the property, spending most of the time with the property, I think.

Q. Mr. Struckmeyer, will you relate to the Court and the jury the nature of the circumstances under which these conversations you have told in response to Mr. Murlless' question arose? Give us the setting of those conversations.

A. Well, it is sort of personal. In our office, we don't always work. We spend some time just talking. I suppose most law offices do. Claude and I were friends, and as I say, when I would complain that I had to pay income tax once or twice, he made this statement there was no reason I should. Mostly just talk.

Q. Well, was it in the tone of kidding?

A. To me it was, yes. I took it as such. [155]

Q. You didn't take it seriously, did you?

A. No, I didn't know, I didn't.

Q. You weren't convinced that he meant literally everything he said?

A. No, I knew Claude didn't mean literally everything he said.

Q. Claude was quite a talker, was he not?

A. Yes, yes, he was.

Q. And these sessions that you refer to might be referred to in vernacular as just recreational bull sessions, or something of that sort?

A. Yes, they might be so called.

(Testimony of James Struckmeyer.)

Q. And isn't it true, Mr. Struckmeyer, that he recommended that you ought to acquire some property for income purposes or for business purposes, and that it might improve your situation income tax wise? A. Yes, he did, yes.

Q. And is it not true that in substance what he said was in substance at least, that many people paid more taxes or paid taxes that they shouldn't, or paid more taxes than they should because they didn't claim all of the deductions to which they were entitled?

A. I took it that this was what he meant, [156] yes. He was worried about my business ability, Mr. Parker. This upset me as not being a very good businessman myself, and generally our talk was just back and forth about that.

Q. I see. You admitted that you are not a very good businessman?

A. The Government told me that, the income tax people did.

Q. Very good, Mr. Struckmeyer. Thank you very much.

Mr. Murlless: No further questions. Mr. Sparks, if your Honor please.

C. L. SPARKS

a witness of legal age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, took the stand and testified on behalf of the Government, as follows:

Direct Examination

Q. (By Mr. Murlless): In connection with this case, you have been sworn, and in that connection, you brought a letter, as I recall, together with a segregation in the letter of certain property belonging to Claude E. Spriggs during 1947 upon which were [157] improvements?

A. That is correct.

Q. Now, with respect to that, that it showed also tax values as a part of your official records as for Maricopa County?

A. The amount of the taxes due on a particular thing.

Q. Those are part of the official records in your office as reflected by your official documents in the Court?

A. In the treasurer's office, yes, sir.

Q. Move for admission of Government's 19 and then Government's 20 for Identification.

The Court: What do you want to prove by them?

Mr. Murlless: I want to locate and affix the addresses of the items that are not described with particularity in the income tax returns which—

The Court: Haven't we covered that by other testimony?

(Testimony of C. L. Sparks.)

Mr. Murlless: I doubt, if your Honor please, that without having the improvement situation reflected in this matter, that it is complete.

Mr. Parker: If your Honor please, that in addition to the former objections which I wish to [158] now renew, I further object that if that is the purpose for offering this evidence, this is an inferior quality of evidence for this purpose and contains extraneous matter which certainly should not be before us.

The Court: This one you have given the history. Was improved by so-and-so that has been on the stand.

Mr. Murlless: Yes, sir.

The Court: Then what about the other property in the testimony?

Mr. Murlless: Yes, sir, the Government's Exhibit land 2 doesn't segregate them as to Henshaw Road and other. It segregates them. Frame, cement, cement, cement, when acquired and there and then and through other witnesses which have been able to locate them with the street address. This is the only case in which the legal description and street addresses are shown.

The Court: I'll admit them provisionally. But whether they go to the jury, I reserve a decision.

Mr. Parker: What are the numbers?

Mr. Murlless: 19 and 20.

The Court: Cross examination, provisionally. I beg your pardon. Mr. Sparks, you have never seen any of this property?

(Testimony of C. L. Sparks.)

The Witness: Not to my certain knowledge.

Mr. Parker: Never——

The Witness: These are the records of the former administration, filed in the office.

Q. And you are not suggesting that as to these exhibits 19 and 20, that the assessed valuations made by your predecessors in the office in a manner have any connection with the value of the property. They don't reflect the actual value of the property?

A. No. I'll state in this particular, if you will notice, that the present assessed valuation and average 30 per cent of fair market value.

Q. The hoped for formula of 30 per cent of fair market value?

A. That exists in my office at this time.

Q. That is your instruction to your field man?

A. That is the records in my office from surveys from different parts comparing the market against the assessed values.

Mr. Murlless: And the assessed valuation, you state is 30 per cent of the fair market value [160] with respect to the pieces of property where a valuation is placed?

A. I didn't intend to convey that in those particular words.

The Court: This has nothing to do with this case. So, you are excused now. What the assessed values are, or fair market value.

Mr. Murlless: Thank you.

LLOYD TUCKER

a witness of legal age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, took the stand on behalf of the Government, and testified as follows:

Direct Examination

Q. (By Mr. Murlless): Name please, for the records? A. Lloyd M. Tucker.

Q. What is your work, Mr. Tucker?

A. I am a special agent for the Intelligence Division of the Internal Revenue, sir.

Q. Do you know the defendant Spriggs?

A. Yes.

Q. How long have you been an Intelligence Agent? [161] A. Since 1945.

Q. How long have you known Spriggs?

A. Since late in '48.

Q. In 1948, were you located in Phoenix for your place of business? A. Yes, I was.

Q. And you have been in that work as a governmental agent since 1945? A. Yes, sir.

Q. And for how long had you been in Phoenix—1948 when you met the defendant Spriggs?

A. Eight years.

Q. Now, in that connection, will you state the circumstances under which you made his acquaintance?

A. Yes. I was requested by the office of the Collector of Internal Revenue at Phoenix, Arizona, to participate in the investigation of the tax lia-

(Testimony of Lloyd Tucker.)

bility of Mr. Spriggs together with Mr. Arthur Beals, who was at that time a deputy collector.

Q. And it was in that connection that you met him? A. Yes, sir.

Q. When was the first time you saw him?

A. I first met him on October 20th, 1948. [162]

Q. And where?

A. In the office of the Collector of Internal Revenue in Phoenix.

The Court: Who was present?

A. Mr. Beals was there.

Q. Who is he?

A. Mr. Beals is presently a Certified Public Accountant and a Professor of Accounting at Tempe College. At that time he was in Government service.

Q. Revenue agent?

A. Deputy collector.

Q. For Arizona? A. Yes, sir.

Q. And where did that first meeting take place?

A. In the office of the Collector here in Phoenix.

Q. Did you have occasion at that time or Mr. Beals have occasion to take certain records from the defendant Caude E. Spriggs?

A. I did, no.

Q. You had not? A. No, sir.

Q. Had certain records been available to you?

A. They were available on October 20th, to me.

Q. In that regard, what did you do?

A. Beginning on October 20th, and continuing for approximately five months period up until March of 1949, I held several conferences with Mr.

(Testimony of Lloyd Tucker.)

Spriggs. I interviewed numerous witnesses, I traveled considerably in Graham County and Maricopa County. I inspected public records, I inspected records of title companies, I inspected records of the Arizona Industrial Commission, I examined some bank records, and I made some examinations of records which had been kept by Mr. Spriggs.

Q. And will you state what you did on this date, that is October 20th, the first day you met him, and if you had conversations with him, tell the jury the questions that were asked, and the answers, and the general tenor of that conversation?

A. Well, on that date, our conversation related principally to this property located at 2008 East Henshaw Road. We had the income tax return——

Mr. Parker: I object. It has no proper foundation laid, and if this is leading up to [164] something which counsel claims is in the nature of a confession or something, I don't know what it is. I object to it on the ground that the status of the record in my humble opinion does not show adequate proof of corpus delicti, and doubt the ability——and this is no——

The Court: Overruled.

The Witness: The conversation related to the Henshaw Road property.

Q. What questions and answers were returned to the best of your recollection?

A. We had income tax returns which Mr. Spriggs had filed before the three of us.

(Testimony of Lloyd Tucker.)

Q. Does that include Government's 2 in Evidence?
A. Yes.

Q. The income tax return for 1947?

A. That is correct.

Q. What other income tax return?

A. Then we had the return filed for '44, '45, '46 and possibly 1943.

Q. And you did have then Government's 3 in Evidence here, that is 1946?

A. That is right.

Q. Go right ahead.

A. We discussed the \$40,000 cost. [165]

Mr. Parker: Just a moment. That is not responsive to the question. The witness was asked to state what he said and what the defendant said, and now he is delivering conclusions about the conversations. Move to strike it.

The Court: Denied. Continue.

The Witness: I asked Mr. Spriggs if the \$40,000 cost basis which he had placed on his return on Henshaw return, was the correct cost basis of that property.

The Court: For what year?

The Witness: Referring to the income tax return for 1947. Henshaw property. I asked him if that was the correct cost, if that figure shown on the return represented the investment in that property. The money which he had spent there.

Q. Refer to Government's 1 in Evidence, it does reflect \$40,000, but not in one item, and will you

(Testimony of Lloyd Tucker.)

state to the jury what you asked and answered on his returns about that——

The Witness: Yes, Mr. Spriggs that it would be, the \$20,000 identified as being of cement construction and the second \$20,000 item also identified as being cement construction was the Henshaw Road property. [166]

Q. Both of them were? A. Yes.

Q. As to the Henshaw Road property?

A. Yes.

Q. Will you proceed?

A. Mr. Spriggs said yes, that he had actually had invested \$40,000 in the property. I asked him where he could have obtained \$40,000 to invest in the property. He had his returns before us, and he stated that he had received income from the practice of law and that he was an attorney and he said that he had made profits from buying and selling real estate. I said to Mr. Spriggs that there were no profits from buying and selling real estate shown on the return, and he stated that he wasn't obliged to show gains from sale of real estate. I told him that the reporting of capital gains with particular regard to real estate, was an elementary point. A tax law, and he said he had returned hundreds and he knew that he didn't have to report gains from the sale of real estate. I asked him again at least it is one other time, if in fact the \$40,000 was his correct investment in the Henshaw Road property, and he stated that it was. This conversation went on for [167] several hours. It started

(Testimony of Lloyd Tucker.)

in the morning and lasted until late in the afternoon. Late in the afternoon, Mr. Spriggs made the statement "you fellows have got me charged with a lot of income. Maybe I don't have \$40,000 invested in that property." So, I asked Mr. Spriggs to go home and inspect all his records that he had available to him relating to the Henshaw Road property. I asked him to talk over with his wife and refresh his memory and do everything that he could do to establish what the cost of the property was, and he stated that he would.

Q. And did you have occasion at the later time to talk to him again?

A. Yes, I met him again on January 6, 1949.

Q. And again, who was present?

A. Mr. Beals was present and Mr. Spriggs.

Q. And Mr. Beals is here in the courtroom, is he? A. Yes, sir.

Q. Where was this meeting consummated?

A. It also took place in the office of the Collector of Internal Revenue.

A. At about what time of day, if you can remember?

A. I don't, I think, recall the time of day, [168] Mr. Murlless.

Q. And what happened in that connection with that meeting?

A. I asked Mr. Spriggs if since the date of our last meeting if he had occasion to renew my records or determine the true cost of the Henshaw Road property. Mr. Spriggs said, yes, that he had

(Testimony of Lloyd Tucker.)

reviewed all of the records he had, and he and his wife had discussed many hours discussing the cost of the property and he was now of the opinion that the cost of the property could even have cost him less than \$40,000. I asked him if he was willing to give a voluntary sworn statement and affidavit stating that, and he said, yes.

Q. Did he? A. Yes.

Q. When? A. January 6, 1949.

Mr. Murlless: I hand you Government's 22 for Identification, and ask you if you have seen that before, Mr. Tucker?

A. Yes, this is the statement which I typed at the Collector's office on January 6.

Q. Is it one that you observed the signature of?

A. Yes, sir, I saw it signed.

Q. Move its admission in evidence, if your Honor please.

(Thereupon the document was handed to counsel.)

Mr. Parker: May I ask a question on voir dire. Mr. Tucker, referring to this Exhibit Number 22 for Identification, and I observe particularly on page two that this is some material written in this in longhand in pen. That is your writing, isn't it?

A. Yes, that is my writing.

Q. Did Mr. Spriggs put his initial also on the margin? A. Yes, sir.

Q. Before or after you wrote the part that is in longhand? A. After I wrote it.

Q. After you wrote it? A. Yes.

(Testimony of Lloyd Tucker.)

Q. If your Honor please, I object upon the grounds there is no proper foundation laid, and upon the further grounds that the exhibit contains immaterial and prejudicial matters which have no bearing upon this case and the—all right.

The Court: I'll have to read it first. Let [170] me have it. Go ahead with the examination.

Mr. Murlless: Go right ahead after the statement was taken.

A. That was the substance of what transpired.

Q. Did he state at that time that he had an opportunity to go over the records with his wife?

A. Yes, he said they had spent many hours discussing it.

Q. Did you have occasion to see Mr. Spriggs at an earlier time, or within a few days of that?

A. Yes, I next saw him on January 23rd, 1948.

Q. And what occurred then, who was present?

A. Mr. Beals was present and the meeting occurred in the office of the Intelligence Division of the Internal Revenue Service in the Security Building here in Phoenix.

Q. What happened there, if you can state what questions and answers you had, if a conversation was had?

A. We devoted several hours of that day talking to Mr. Spriggs asking him questions, looking at his records relating to the assets and liabilities of which he had of certain dates [171] with particular regard to January 23rd, we were talking

(Testimony of Lloyd Tucker.)

about the assets and liability which he had for the years ended 1941, 1942.

Q. Well, with respect, let's confine it, if we may, to his situation in 1947. To the best of your knowledge, was anything done or conversation had, that transpired with respect to the tax situation in 1947?

A. No, not on that date.

Q. When did you have a chance next to see him?

A. On the following day.

Q. What, if anything—

A. Mr. Beals was present and the meeting took place in the office of the Intelligence Division of the Revenue Service in the Security Building.

Q. And on that date, the discussion continued with regard to Mr. Spriggs assets and liabilities of other dates?

A. On that date, we were discussing the years and in 1943 and 1944.

Q. Did you have occasion at that time to discuss with him the significance of his tax situation of the year 1947?

A. I don't think that on that date that we [172] did.

Q. Did you have occasion to talk with him at a later time?

A. The following day.

Q. What day was that, sir?

A. That was January 25th.

Q. All right, did you have occasion to talk with him with respect to his situation in 1947 at that time?

A. Yes, not with particular respect to 1947 on

(Testimony of Lloyd Tucker.)

that date, as on the previous date. We were discussing the assets and liabilities which he held as of the year 1945 and 1946.

Q. Did you have occasion during those prior days, about which you have spoken, did you have occasion to talk concerning the dates of the building of the various units on Lots 47 and 48 Eubank Tract?

A. The portions of the conversations related to the Henshaw Road properties and other properties which he owned.

Q. When was the information complete, or what you have of it complete concerning that Eubank Tract property?

A. As of January 26th and January 27th.

Q. Now, this, in that connection, and you [173] did then have occasion to talk to him on January 26th and 27th? A. Yes, both days.

Q. With respect to January 26th, 1949, will you state what happened?

A. On January 26th, 1949—on that day we talked to him about his assets and liabilities for the year ending 1945.

Q. Did that include Eubank Tract?

A. Yes, it did.

Q. Very well, go ahead.

A. We drew up a net worth statement, that is a financial statement disclosing his assets and liabilities and net worth and on that day, he read the statement and signed it.

Q. Do you have that statement, sir, or do I?

(Testimony of Lloyd Tucker.)

A. I think I have it. Later on that day, we prepared a net worth statement for Mr. Spriggs for the calendar year ended on December 31, 1946. Mr. Spriggs read that statement over and he stated that the net worth had increased too much, and therefore, he wouldn't sign it.

Q. Very well, and on the next day, did you have a further occasion to talk to him?

A. Yes, on January 27th with him again.

Q. Now, this series of conversations had [174] involved among other things, the investments with respect to Eubanks Tract, Lots 47 and 48 with which there has been testimony here?

A. Yes.

Q. And will you state in that regard, if that compilation was made with respect to those units, or with what did it consist? Did you have the compilation of that of each unit. The Lots 47, 48 of Eubanks Tract?

A. Yes, I have that.

Q. Do you have the original of that?

A. Yes, it is on the table.

Q. All right, I am afraid you will have to come down now, Mr.—maybe not. I hand you what appears to be a schedule of the assets of Eubank Tract. Is that the compilation that was concluded on or about the 27th day of January, 1949?

A. Yes, sir.

Q. It will be marked for identification, if your Honor please.

(Thereupon the document was marked as Government's Exhibit 23 for Identification.)

(Testimony of Lloyd Tucker.)

Q. Now, this appears here, an original and one copy, is that right, sir?

A. Yes, that is what——

Q. Handing you Government's 23 for Identification, [175] will you state to the jury what that represents?

A. Yes, it shows on here, on this schedule the number of dwelling units located on the property, a storeroom, a store building, a restaurant and a barber shop. It shows the dates that these various structures were acquired or completed. It shows the cost of the furniture that was included in the dwelling units, it shows the depreciation rate applied to the store buildings, the dwelling units and the furniture and the amount of depreciation allowable for the year 1947.

Q. Now, the depreciation allowable is something you put on afterwards, is that right?

A. Yes, sir.

Q. Now, with respect to the entries and the items or the units that are listed or the furniture that is in connection with each, is that a result of this series of conversations that you had with Mr. Spriggs concerning his net worth on the date you have stated that culminated in the January 27th, 1949, meeting?

A. Yes, sir, that is right.

Q. And in those conversations, to each of those items your and his mind did come to agree [176] that is what it was?

A. Yes, sir.

Mr. Parker: This is a matter that has come to

(Testimony of Lloyd Tucker.)

my mind that is the very aggressive and leading questions of this witness, who are presumably able to perform their own answer without the aid of counsel.

The Court: Give him that.

Q. You have a copy that counsel could be provided with, have you not? A. Yes.

(Thereupon the document was handed to counsel.)

Mr. Parker: It is being offered in evidence?

Mr. Murlless: I didn't, but I will. I offer Government's 23 in Evidence.

Mr. Parker: I most certainly object. It is wholly incompetent. Not relevant and no proper foundation. I certainly ask the Court on inspection——

The Court: Are there cost figures?

Mr. Parker: Some sort of computations.

The Court: Yes, sir; cost figures. Where do you get those cost figures?

A. From conversations from Spriggs.

Q. He gave you those costs? [177]

A. Yes, sir.

The Court: It is admitted. 22 is admitted also.

Q. Going back for the moment, to the first of your conversation, Mr. Tucker, that is on account, correction, it is not the first, it is January 6th conversation, at which you stated that a statement was taken; will you with as much speed as possible, read that statement?

The Court: What is it, 22?

A. Yes, sir.

(Testimony of Lloyd Tucker.)

The Court: I don't want him to read it. You can read it when it comes time to argue.

Mr. Murlless: Now, Mr. Tucker, at a later time did you have occasion to talk to Mr. Spriggs again, that is, January 27th, 1949?

A. Yes, I talked to him on that date.

Q. And on that date, did you have occasion to take a statement from him? A. Yes, sir.

Q. Who was present? A. Mr. Beals.

Q. Did you warn him of his constitutional rights? A. Yes, sir.

Q. Where did that happen? [178]

A. In the office of the Intelligence Division, Revenue Service.

Q. Tell me what time of the day?

A. I am quite sure it was in the afternoon.

Q. And were the questions asked and answered on his return, about his tax situation as of the year 1947? A. Yes, sir.

Q. I hand you Government's Exhibit—may it be marked in evidence, if your Honor please?

(Thereupon the document was marked as Government's Exhibit 24 for Identification.)

Mr. Murlless: I hand you Government's 24 for Identification, and ask you if that is the statement about which you have just testified?

A. Yes, sir; this is the statement.

Q. Now, and where was that taken?

A. In Phoenix, in the Security Building.

Q. Was that a time when questions were being

(Testimony of Lloyd Tucker.)

asked and answered concerning the tax situation in 1947? A. Yes, sir.

Q. Does it purport to be by him?

A. Yes, sir.

Q. Signed by him in your presence?

A. Yes, sir. [179]

Q. I move for admission in evidence, if your Honor please, of Government's 24.

(Thereupon the document was handed to counsel.)

Mr. Parker: This is a rather lengthy document and it will take some time to inspect, if you can pass it now.

The Court: Yes, pass it.

Mr. Parker: Or do you—all right.

Mr. Murlless: With respect to Government's 22 in Evidence, will you state what was the aggregate amount of cost basis that you arrived at with Mr. Spriggs?

The Court: You got it the wrong number.

Q. I understood the Court said it was admitted, too. Pardon me. 23. That's with respect to Government's 23 in Evidence.

Mr. Parker: If your Honor please, I certainly object to that. If, that isn't signed by Spriggs. That is just some tabulation.

The Court: You mis-heard it.

The Witness: The total investment as shown in the amount of \$19,324.10.

Q. Is that the same figure to be found in Government's 24 for Identification?

(Testimony of Lloyd Tucker.)

A. Yes, sir. [180]

Q. That is the other statement?

A. Yes, sir.

Q. Same figure? A. Yes, sir.

Q. Very well, sir. Now, will you go ahead with what happened that day, other than the taking of this statement? A. Of——

Q. January 27th, 1949.

A. It was about all that transpired on that date.

Q. Did you conduct any other investigation in this regard, sir?

A. What I related was pretty well encompassed.

Q. Very well. Subsequent to this time, January 27th, 1949, did you have occasion to compute to some extent the depreciation that was properly allowable on the Eubanks property as is represented in Government's 23? A. Yes, sir.

Q. You have done that at some length?

A. Yes, sir.

Q. Will you state the basis upon which it was done and what the aggregate of that depreciation allowable is?

Mr. Parker: I object to that for a number [181] of reasons. One is of multi-fariousness. Contains more than one question. Secondly, as a matter of law, there is no prescribed formula for depreciation.

The Court: You keep missing something. He testified that there was, what your client agreed to as a proper—your bill of particulars doesn't make any point about the wrong rate of deprecia-

(Testimony of Lloyd Tucker.)

tion being claimed by the taxpayer. It simply states that falsely overstated the cost, and your testimony shows subject of course to what else has developed and the jury, that he claimed depreciation on \$40,000 on a cost of \$40,000, alleged cost of \$40,000, when in fact, the cost was just half.

Mr. Murlless: That is well, your Honor, and I am agreeable to that, but I hoped that we wouldn't have to comply with that bill of particulars.

The Court: You resist at giving a bill of particulars in the present case and I had in mind that you had given one before and I wasn't going to make you give one, but I also had in mind to hold you also, you wouldn't give me another.

Q. All right, then you have not had occasion to compute.

The Court: It doesn't make any difference. It is irrelevant on the basis of what I am saying. Your case, the amount of the cost. What was the true cost, \$40,000 or \$20,000, or at any rate, what was the something difference, was it less than \$40,000?

Mr. Murlless: Has the Court made itself clear to you?

The Court: It doesn't matter whether it is clear to him or not, it is clear to me.

Mr. Murlless: In that connection, what I ask you, can you sit there and compute the depreciation upon the cost basis as provided you by the defendant Spriggs?

The Court: That doesn't make any difference,

(Testimony of Lloyd Tucker.)

that is a matter of the argument. Your case is that he claims it was as great a cost as the basis of the depreciation, and in fact was. Now, let's keep it to that.

Q. I'd like to have this witness compute the tax, and I am not very good.

The Court: The case is that he charged twice as much on the cost basis as he is entitled to, but he is going to be subject to cross examination, and if you want him to compute the tax, what it should have been on your theory of [183] on \$20,000, rather than on \$40,000, I'll let him do it, but he can do it later on instead of now. Have you had a chance to read the document?

Mr. Parker: No.

The Court: Would you like the cross examination to go?

Mr. Parker: Yes.

The Court: Is this your last witness?

Mr. Murlless: We figured the day after tomorrow is Saturday, and this is our last witness.

The Court: Well——

Mr. Murlless: We figured the day after tomorrow is Saturday.

The Court: Well, let's see now, 1 o'clock. Ladies and Gentlemen, you are excused until 1 o'clock tomorrow afternoon.

(Thereupon the jury was admonished and excused until the following day.) [184]

(Thereupon the Court was reconvened on April 2nd, 1954, at 1:00 o'clock p.m.)

(Testimony of Lloyd Tucker.)

(Lloyd Tucker having been heretofore sworn, retakes the stand and testifies as follows upon direct examination.)

Mr. Murlless: If your Honor please, as I recall it, the last thing, about the last subject matter that was discussed last night was my question into what precisely was the issues we are confined to in this case pursuant to a Bill of Particulars. Now, I have become concerned, if your Honor please, because there is an exhibit in evidence that does not reflect the Court's judgment in that regard. That is my recollection of it. In that regard I will ask the Court to take Government's Exhibit No. 23 and I will, if the Court please, ask that certain parts of it be stricken to the end that the evidence complies with the Court's judgment on the last ruling as I recall it. It is the one there——

Mr. Parker: If the Court please, I have a general objection to that exhibit made by Mr. Murlless upon the ground that there has been no sufficient proof of the prima facie case entitled to come into evidence and of course the grounds that it does cover subjects that I don't think [185] are properly relevant and Counsel has not indicated which portions he wants to retain and have taken out—I don't believe that in that we know what we are dealing with.

The Court: Remind me after the end of the Government's case.

Mr. Murlless: Mr. Tucker, to the best of my

(Testimony of Lloyd Tucker.)

recollection you were, could the last question be read?

The Court: Weren't you through with him?

Mr. Parker: The examination in chief had been completed as I understood.

The Court: All right, open it up.

Mr. Murlless: What was the last question, Mr. Tucker, what was the last subject matter?

A. Yes, I was testifying with regard to the depreciation taken by the defendant on the Henshaw Road property.

Q. Now, in that connection, you stated that there had been a series of conversations between the, as I recall it, the 6th of January, and 27th or 26th or 27th?

A. Yes, going back to the first one was on October 20th, and the next was on January——

Q. With respect to Government's Exhibit No. 23 and only so much of that as returns to amounts [186] with those conversations with which those amounts appearing on the left hand side of the Government's No. 23 were discussed and arrived at?

Mr. Parker: That calls for a conclusion of the witness, I object.

The Court: You may answer.

A. Yes, I recall that on all of those dates beginning in October and continuing on January and on January 23rd and 24th.

Q. Will you state, pardon me.

A. That the conversation, or portions of it on

(Testimony of Lloyd Tucker.)

all of those dates related to the Henshaw Road property.

Q. In that connection will you state to the jury the method by which you arrived at the conversation just before the arrival of the gross or the aggregate of that cost basis there?

A. Yes, as I stated yesterday, on January 6th Mr. Spriggs advised me at the office of the Internal Revenue here in Phoenix that for a considerable length of time since our last discussion on October 20th, 1948, that he had expended considerable time discussing the matter of the Henshaw Road property with his wife and that he had reviewed all of his available records and he stated on that date that he felt that he couldn't have [187] less than \$40,000.00 invested in the property and on that date I think there is in evidence a statement which I took from him in that regard in which he stated that his investment in the property wasn't less than \$40,000.00. Beginning on January 23rd I had a series of conversations with him and on January 26th I recall that we discussed Mr. Spriggs' assets and liabilities and net worth for the year ending 1945 and he agreed to the items on the statement and signed the statement and we next went into the year 1946, and we prepared the same type of schedule, the net worth statement, for him for the calendar year ended 1946. Mr. Spriggs reviewed the statement at some length and he stated that he would not sign that statement as he had signed the earlier statements. I asked him why he wouldn't

(Testimony of Lloyd Tucker.)

sign it and he stated that his net worth had increased too much and that he wouldn't sign it for that reason. So I went over each item with Mr. Spriggs that was on the statement and discussed it with him and he was in agreement and stated that the items shown were correct with the exception of the Henshaw Road property. I asked him why he now disagreed with the cost of that property when on previous occasions we had been in complete agreement with it. He stated [188] there was just too much income there and he said, "Well, I'll tell you fellows exactly what happened." He said, "When I went to file my 1947 Income Tax return," he said, "I added \$10,000.00 to the previous cost of the Henshaw Road property," and he said, "I saw I was going to have to pay some tax, so I added another \$10,000.00, making a total of \$40,000.00; I wasn't to have to pay any tax for that year," and at that time I made a memo of the statement which, statement which Mr. Spriggs, had made in that regard.

Q. Do you have that memo? A. Yes, sir.

Q. When, in respect to the conversation, was it made?

A. It was made right at the time of the conversation immediately thereafter.

Q. May this be marked for identification?

The Court: That won't be admissible unless Mr. Spriggs signed it. It is a memo of what he has just testified to, isn't it?

The Witness: Yes.

(Testimony of Lloyd Tucker.)

Mr. Murlless: Yes, your Honor.

The Court: Unless you want it in. Do you want it in?

Mr. Parker: No. [189]

Mr. Murlless: Now, in this regard had you in connection with that series of conversations where net worth was stated and the cost basis was arrived at, have you prepared a computation, assuming it is 10% rate of depreciation is correct, upon that—

The Court: Where do you get that, is that the rate the taxpayer used?

Mr. Murlless: Yes, your Honor, and that is where this—

The Court: Does his return show he used that rate?

Mr. Murlless: Yes, your Honor.

The Court: All right.

Q. Have you prepared on the basis of the new or well—first will you state please what aggregate of cost basis was arrived at out of those conversations?

A. The aggregate of the cost of that property as stated by Mr. Spriggs in the conversations that I have related was a total of money expended for improvements on the property, and furnishings in the units, dwelling units.

Q. Do you have them segregated?

A. Yes, sir, they are segregated.

Q. What was the aggregate of that group of [190] determinations that were made in those conversations?

A. The sum of \$18,924.10.

(Testimony of Lloyd Tucker.)

Q. And for what was that?

A. That was for 13 dwelling units constructed on the Henshaw Road property, a store room and a store building, a restaurant and barbershop, and the furnishings in the 13 dwelling units.

Q. And in connection with those entries aggregating how much? A. \$18,924.10.

Q. Now, in connection with those items aggregating that, have you computed a property depreciation for the year 1947 upon the rate as shown by his 1947 Income Tax return?

A. Yes, as shown by his return: I have computed the depreciation on the buildings and upon the furniture.

Q. And will you read that computation?

A. Well, may that be marked for identification first?

The Court: I don't think we can put that computation in. So long as he has testified to facts those are just aids to his memory. The other side is privileged to examine if you wish and may open it up in another way. [191]

Mr. Murlless: Yes, sir. You also conducted the investigation in respect to some transfers of real property with improvements during the tax year of 1947 *which* the defendant, Claude E. Spriggs.

A. Yes, sir.

Q. You have heard the testimony here that went to that subject matter? A. I have.

Q. Have you computed upon the basis of that, assuming for a moment the truth of the Govern-

(Testimony of Lloyd Tucker.)

ment's evidence here in this case, have you computed the net profit and taxable gain with respect, for instance, to the Eglar-Spriggs-Arreola transaction?

Mr. Parker: I should like to register a general objection to testimony pertaining to the alleged capital gains because they fall under "a" and "b" and not relevant to the issue.

The Court: You may answer.

The Witness: Yes, sir, I have made the computation.

Q. Have you it with you? A. I have.

Q. And will you read the computation, or will you state the computation to the jury?

A. With regard to the property which was purchased by Mr. Spriggs from Mrs. Fisher and [192] subsequently sold by him to Mr. Van Denburgh. Now by the gain, the sale price was \$2,696.59. I would say it was \$2750, but Mr. Spriggs incurred some expenses in connection with the sale and the cost was testified to be \$2,000.00 and in addition to that the expenses incurred by Mr. Spriggs have been added to that cost giving him aggregate cost and the profit, the difference between the sales price and the purchase price which is taxable at 100% in this case because it was sold approximately two months from the time it was purchased for \$574.84.

Q. This is the Fisher-Spriggs-Van Denburgh transaction about which you are testifying?

A. Yes, sir.

(Testimony of Lloyd Tucker.)

Q. I see. And what was the profit, did you state it? A. Yes, sir.

Q. \$547.74—.84? In that same regard, and with respect to the other transaction, the Eglar-Spriggs-Arreola transaction, have you a like computation, and will you state the computation for the jury to determine net profit?

A. Yes, sir. It was testified that the sale price paid by Arreola is \$8,500.00 and in connection with that Mr. Spriggs incurred expenses of [193] \$507.85 for real estate commissions, escrow fee and title fee and Internal Revenue stamps.

The purchase by Mr. Spriggs from Mr. Eglar was \$5,500.00, and the gain or the difference between the sales price and the purchase price is \$3396.31; however, the taxable gain is only one-half of that in the amount of \$1,698.15.

Q. Were, very well, sir, I hand you Exhibit 2 in evidence and ask you if in the appropriate place there if there are any reports of taxable gains?

A. No, no gains reported.

Q. With respect to the Fisher-Spriggs-Van Denburgh what sum should have been in there upon assumption of the truth of the evidence of the Government here?

A. There should have been reported a long-term gain of \$1,698.15 and a short-term gain of \$547.84.

Q. Now, with respect to Government's 2 in evidence, will you look at the depreciation schedule and state to the jury the aggregate of the depreciation claimed? A. Added in my head here.

(Testimony of Lloyd Tucker.)

Q. Take a moment to do it so that it is not——

A. \$5,462.50.

Q. You stated however that you and Mr. Spriggs [194] came to a determination of an aggregate, well, first, may that be stricken—what is the shown cost basis there for the Henshaw Road property?

A. The correct basis of the property?

Q. No, what is shown on Government's Exhibit 2 for Henshaw Road property.

A. \$20,000.00 and \$20,000.00, total of \$40,000.00.

Q. In two different items? A. Yes, sir.

Q. You have stated, I think, that now with respect to the corrected or agreed cost basis of that property, will you state that, what that was, and how you computed it?

A. Yes, by taking the cost of \$18,924.10 as stated by Mr. Spriggs and applying a 10% rate to that which would depreciate the property out entirely in 10 years and enable the taxpayer to recover the entire cost. The depreciation based upon that rate was the sum of \$1,893.68.

Q. Total result that you testify is that there was some part in excess of \$5,000.00 shown on Government's Exhibit 2 which was disallowable?

A. When I looked at Government's Exhibit 2 I was stating the depreciation, not only with regard to the Henshaw Road property but to the other property which he owned. [195]

Q. Very well. Of the \$40,000.00 claimed cost basis of Government's 2 claims on the basis of the 10% rate, what was the figure?

(Testimony of Lloyd Tucker.)

A. \$4,000.00.

Q. Of that \$4,000.00 in this new, this computation of cost basis, that you arrived at with Mr. Spriggs, some of it is disallowable?

A. Yes, sir.

Q. Will you state to the jury the computation there for?

A. The depreciation claimed on this return was \$4,000.00. The depreciation allowable on 10 year rate was \$1,839.68, a difference was disallowed was \$2,160.32.

Q. Now, that is still on the basis that would depreciate out in 10 years? A. Yes, no value.

Q. Now, your education and experience in your work you are able to compute the income tax, assuming that the Government's evidence in this matter is correct and in compliance with the testimony you have just given with respect to the taxable gains and the alleged overstatement of cost and disallowed depreciation?

A. Yes, I could make a computation like that.

Q. Will you do that for the jury? [196]

A. Mr. Murlless, may I ask you—as this is a fairly detailed computation——

Q. To what extent?

The Court: Just give your result, the tax he should have reported.

A. Very well, the tax that should have been reported was \$910.09. There was no tax reported therefore for the additional taxation is the same amount, \$910.09.

(Testimony of Lloyd Tucker.)

Q. When you say "No tax reported" you are talking about Government's 2 in evidence? Thank you very much, sir. Your witness.

May we offer Government's 24 again which, as I understand, wasn't admitted yesterday?

The Court: What is that? Just tell me.

Mr. Murlless: The statement taken on January 27, 1949.

Mr. Parker: Same objection.

The Court: What?

Mr. Murlless: Portions that are relevant to the case.

The Court: I'll look at it later.

Cross Examination

Q. (By Mr. Parker): Mr. Tucker, how many months altogether did you work on this Spriggs matter? [197]

A. Well, I started in October. I worked November and December, January, February and March. During a five month period, intermittently, of course.

Q. You didn't work full time on it?

A. Not all day, every day.

Q. At some point or other Mr. Beals came into the matter with you?

A. Mr. Beals was investigating the matter prior to October of 1948.

Q. I see. He participated with you in whatever was done after you got on to this case?

A. Yes, sir, after I entered the investigation Mr. Beals and I worked together.

(Testimony of Lloyd Tucker.)

Q. In the course of your investigation you had occasion to ask Mr. Spriggs for all his records pertaining to this Henshaw Road property?

A. No, I didn't ask him for them.

Q. They were asked for then by Mr. Beals, is that your understanding of the matter?

A. Yes, sir.

Q. And after they were turned over, at least he turned over a great many records, receipts and various kinds of data to you, didn't he?

A. Yes, there were records turned over to Mr. Beals.

Q. And weren't there two or three cardboard [198] boxes full of such records handed over to you voluntarily by Mr. Spriggs?

A. Not to me.

Q. Or to Mr. Beals, I mean to say, didn't Mr. Spriggs, all through this matter tell you or at least in some stage of that he had nothing to hide that if he owed any tax to the Government, he'd be glad to pay?

A. I don't recall him making that statement.

Q. Would it be his, your statement that he never made such a statement to you?

A. Yes, it would be my testimony that I can't recall him ever making such a statement.

Q. I'll ask you if on one occasion he made that statement to you in the presence of Mrs. Spriggs?

A. I never saw Mrs. Spriggs in my life until November of 1951 during the first trial of this case.

Q. Now, Mr. Tucker, in addition to boxes of

(Testimony of Lloyd Tucker.)

various papers and receipts which he turned over to you or to Mr. Beals, he also turned over a—some ledgers and various types of books of the kind that people ordinarily keep their records of accounts in at home?

A. Yes, it is my recollection that he did turn [199] over the some boxes like that to Mr. Beals.

A. Yesterday you testified, Mr. Tucker, that you, in connection with the amount of money that he said that he had put into this property, that you directed his attention to his income for, I believe, you said '44 and '45 and '46, and said to him in substance on this kind of an income how did you get the income to put into that property?

A. Yes, that is substantially what was said.

Q. What did you tell us that his response had been?

A. He said all the money I have earned is shown on the return and he stated that he was a lawyer and that he had income from the practice of law and that he had bought and sold considerable real estate on which he had received monies.

Q. To the best of your knowledge is that the sum total of the explanation he gave you?

A. Yes, that's it—Mr. Spriggs on one occasion, October 20th or January 6, made some mention of a, I think it was a gift of money that his wife received in the amount of something like a little in excess of \$8,000.00.

Q. And, Mr. Tucker, have you now related everything that he gave you on any occasion by

(Testimony of Lloyd Tucker.)

way of explanation of the point that you had called to his attention. To the best of your knowledge?

A. To the best of my knowledge; I have had many hours of conversation with Mr. Spriggs. I cannot recall everything that was said.

Q. A great many hours?

A. I could compute it in my mind and tell you almost exactly how many.

Q. Do you keep a record of the number of hours that you spend with a taxpayer?

A. I always keep a record of the days that I interview anyone and sometimes the hours are shown. They may not always be——

Q. Now, Mr. Tucker, is it not a factor that Mr. Spriggs when you called his attention to his modest income during the years '44 and '45 and '46 or any of those years that he told you that the first time the thing was brought up that he told you that his wife's father had given her a ranch or that she had inherited a ranch up in Graham County and that they had sold the ranch for \$24,000.00 just prior to coming down to Phoenix in 1943, and that they were receiving payments in addition to what they got down—they were receiving payments something around seven or eight thousand dollars a year on the purchase price of that ranch—is that not true? [201]

A. I recall somewhat the circumstances because I investigated the transaction up in Graham County.

Q. Would you just answer my question, sir?

(Testimony of Lloyd Tucker.)

A. My answer would have to be that I don't recall whether he said they were getting seven or eight thousand dollars or not. If that is the case I might have the recorded entries because the transactions of the purchase and sale of the ranch they say, as I say, I examined it.

Q. Did he not also tell you about a gift or a loan—did he tell you about the sale by Mrs. Spriggs of an office building and, in Safford that her father had given her, and which her husband had used for a time for an office to practice when you, he was in Safford?

A. Yes, I investigated that transaction.

Q. And then you knew that that sale had been made for about \$3,750.00?

A. I don't recall the price, Mr. Parker, I can very easily give it to you if you would like to know.

Q. And then didn't he also explain to you that they had sold their home in Safford about the same time?

A. That is right, I investigated that transaction, too. [202]

Q. For about \$4,800.00?

A. That may be the amount; I don't remember.

Q. Did he not also tell you, Mr. Tucker, that he had borrowed various sums of money from the Valley Bank during that period when he was improving the Henshaw Road property?

A. I don't recall, he may have said it. I don't know that I investigated all the loans at the Valley Bank.

(Testimony of Lloyd Tucker.)

Q. Do you remember whether or not he told you that he had also borrowed money on the property that he owned at 515 East Pierce?

A. No, I don't recall it.

Q. And that he had mortgaged his own home for approximately \$6,000.00 to raise money to put into this?

A. Yes; I remember that transaction.

Q. Then did you mean to convey by your testimony in chief to this jury that there were no other sources that you knew about and that he was; did you mean to convey the impression to the jury that he was probably cheating on his income tax to the extent of getting this amount of money to invest?

A. As I recall, my testimony was that I was relating the conversation I had with Mr. Spriggs [203] and what he said.

Q. No, Mr. Tucker, I'll ask you if it isn't a fact that during this investigation and particularly during January, 1949, when you were seeing Mr. Spriggs at least in the latter part of that month practically each day at your office, that you repeatedly told him that all you were interested in was to get this straightened up and that you couldn't get it straightened up until he signed some statements or another that you had prepared for him?

A. No, that's not right at all.

Q. That is not right? Now, on those occasions when you saw him there, the 23rd, 24th, 26th, 27th, of January, 1949, how did he come to be in your

(Testimony of Lloyd Tucker.)

office? Did he come there without being told to come, or what?

A. No, it was by appointment by previous arrangements.

Q. What did you do, phone him and tell him to get down there?

A. I don't recall whether I phoned him or whether he phoned me. I know that I didn't see him between January 6th and January 23rd. So whatever happened it must have been a telephone conversation.

Q. And when you computed these figures about [204] cost, didn't he tell you that a lot of his costs he had no records for?

A. Yes, he said that.

Q. And didn't he tell you that at the time he made these improvements he was buying materials wherever he could get them? Didn't he tell you that? A. Yes.

Q. Didn't he tell you that some of the materials were even delivered in the middle of the night to that place by truckers and such people?

A. Well, I don't recall it; he might have.

Q. Didn't he tell you that the conditions under which he was able to get some materials required that he be out there at the site in the dark with the cash in his hand and that the truckers who sold him the material would not even give him an invoice or a receipt?

A. I remember most of that except about the night part.

(Testimony of Lloyd Tucker.)

Q. And that that happened in the daytime, too, that they demanded cash and wouldn't give them any scratch of a pencil that they had even gotten any money or what they had delivered?

A. Yes, I remember some conversations about that. [205]

Q. Did you make any allowance in your computation at all or estimate for these factors and items?

A. Well, if you will forgive me I don't know what kind of allowance.

Q. You have come up here, sir, with a figure which you say, according to your formula, \$18,924.10, according to your formula, that is for the improvements and the furnishings on this property. What I am asking you is, did you make any allowance or whatever for these various items that were cash items without any records or any invoice or anything for them?

A. Well, I think your question is predicated on the statement that I didn't make, that it was my computations. It wasn't my computations at all.

Q. Just a moment, sir. Let me reframe the questions—did you predicate this \$18,924.10 with any allowance at all for these cash items for which there were no records?

A. Yes, the \$16,000.00 figure was stated by Mr. Spriggs to be his total investment.

Q. Well, you had some kind of a breakdown. You put the figures down, you computed this?

A. Well, I would have to answer your question

(Testimony of Lloyd Tucker.)

this way: that probably Mr. Beals and Mr. Spriggs and I all had a pencil from time to time writing [206] figures. I know we wrote down many figures, pages of them.

Q. I am asking you what part of \$18,924.00, if any, was allocated to these cash purchases for which no records were available?

A. They are in the \$18,000.00 figure.

Q. How much was allowed for that type of purchase?

A. Mr. Spriggs never stated how much of the \$18,000.00 that he paid for at night or without a receipt or with a receipt.

Q. And you don't know how much of the \$18,924.00 was allocated to those items for which he had records and cancelled checks and how much of that sum was allocated to those sums for which he had no records?

A. Not exactly. I have seen checks written to various payees which Mr. Spriggs identified as being expended on the Henshaw Road property.

Q. Now, Mr. Tucker, I'll bring this to a conclusion: isn't it a fact that at the time he signed this statement here that his check not yet in evidence on the 27th of January, that he told you at that time, he said, "I don't know whether those figures are right. I assume you are going to let my accountant check them over [207] and that they are signed subject to a subsequent recheck." Didn't he say that?

(Testimony of Lloyd Tucker.)

A. No, he didn't qualify the signing of the statement.

Q. Didn't you tell him at that time to go ahead and sign it that he could check it over and if the figure was wrong just to let you know you would fix it up?

A. I never made a statement like that to any one.

Q. You never did? A. No.

Q. The fact is then that Mr. Spriggs was, according to your testimony, just accepting your figures for these items all the way through?

A. I am sorry, but I don't think that that was my testimony. As I seem to recall, my testimony was that Mr. Spriggs furnished those figures.

Q. But you did the computing?

A. The computing? You mean I added them up to \$18,000.00; I guess I did.

Q. Now, you have testified to these two transactions here, Arreola and Fisher-Van Denburgh and I have objected on the ground that I think it is irrelevant, but subject to that objection without waiving it, I would like to ask you a question or [208] two with regard to the Van Denburgh matter. Did you make allowance between \$200.00 and \$300.00 actual costs of the architectural plans which Mr. Spriggs included in that sale and which Mr. Van Denburgh had stated on the witness stand was a part of the consideration?

A. I made allowance of \$125.00 which was what

(Testimony of Lloyd Tucker.)

Mr. Spriggs stated he had paid in this and had it in his record. \$125.00.

Q. \$125.00, not \$225.00? A. No.

Q. You did make an allowance of \$125.00—for the other what allowance did you make it, for improvements, water heaters, plumbing, and the like that Mr. Spriggs made between the time he bought it and sold it?

A. I made no allowance: Government's 2 shows that no additions were made to the property, and we discussed the matter with Mr. Spriggs and I have some papers here relating to the money that expanded on the property and it was all claims and expenses allowed as an expense.

Q. So you made no allowance at all for any improvements? A. None at all.

Q. Not a cent? [209] A. No.

Q. How long did you say you had been with the Internal Revenue Service?

A. Since 1945.

Q. Do you take courses of study there in how to testify on a witness stand?

A. No, I don't believe I ever have. I have attended schools sponsored by the Internal Revenue Bureau, but I don't think I have ever attended that.

Q. Don't they lecture you on that subject?

A. I don't believe that I ever was lectured to that.

Q. You are not sure?

A. Well, as I say, I have attended these schools

(Testimony of Lloyd Tucker.)

and some attorney that was instructor may have said something about court procedure. I don't recall it.

Q. That is all. [210]

Redirect Examination

Q. (By Mr. Murlless): Mr. Tucker, one moment. There has been some reference to the difference between the figures: I think \$18,924.10, and the figure \$19,324.10. From your records can you tell what that difference is?

A. I'll be glad to explain it. The total cost of the entire property was stated by Mr. Spriggs to be \$19,324.10, but depreciation was only applicable to improvements on property, not to land, and the sum of \$400.00 only was allocated to the land. That accounts for the difference.

Q. The sum of \$400.00 was allocated to land?

A. Yes.

Q. Was that also from what he told you about that property?

A. Yes, it came from discussions: I can't remember any direct statement he made. I do recall that in discussing the general description of the area down there that property was not worth very much and land was not worth very much and the lots were presumably not of very much value except the improvements.

Q. Very well, sir; and the difference between those figures is the land?

A. Yes, sir. [211]

(Testimony of Lloyd Tucker.)

Q. With respect to the computation of the net profit and then on to the taxable gain, in connection with the Fisher-Spriggs-Van Denburgh transactions, will you state that computation again not only what was given for the plans but for other expenses?

Mr. Parker: If your Honor please, it's been gone into before.

The Court: Objection sustained.

Mr. Murlless: Now, as I understand it, with respect to the other property that is the Klein's property, the Egler-Spriggs-Arreola property, you stated that consideration was given to certain water heaters by reason that they were claimed as expenses; was that my understanding?

A. My testimony was that Mr. Spriggs had some records relating to that property and all of the expenditures made by him were charged to the expenses during the year they were made and we allowed them to him.

Q. That, did that include water heaters or plumbing?

A. No, I don't specifically—no, I can't say that I do.

Q. Thank you very much. If your Honor please, I should like to call next Mrs. Marjorie Ross. [212]

MARJORIE ROSS

a witness of legal age, having been previously sworn to tell the truth, the whole truth and nothing but the truth, took the stand on behalf of the Government and testified as follows:

Direct Examination

Q. (By Mr. Murlless): Your name is Marjorie Ross? A. Yes.

Q. Mrs. Ross, what is your work?

A. I am employed by Struckmeyer and Struckmeyer.

Q. May I ask you to speak a little louder, I can't hear.

A. I am employed by Struckmeyer and Struckmeyer.

Q. What was your work in 1945?

A. Same—as stenographer.

Q. And it still is? A. Yes.

Q. And what, do you know the defendant, Claude E. Spriggs?

A. Yes, Mr. Spriggs was an associate in the office when I started to work there.

Q. And that is the connection, that is where you met him as, was at your office? A. Yes.

Q. In this connection have you ever heard Mr. [213] Spriggs state his views with respect to the payment of income tax?

A. I was present in the office when he had discussions with Mr. Struckmeyer and other people.

Q. Can you recall generally what discussions there were there?

(Testimony of Marjorie Ross.)

A. Generally, that he didn't, no one had to pay these taxes if they knew how to take their deductions.

Q. Sorry, I can't hear you.

A. Generally, that you didn't have to pay taxes if you knew how to take your deductions.

Q. Did he mention any specific deductions?

A. Well, I know he had property and he meant depreciation on his property and also just generally speaking.

Q. Thank you very much, ma'm. Your witness.

Mr. Parker: No questions.

DON HAMMON

a witness of legal age, having first been sworn to tell the truth, the whole truth and nothing but the truth, took the stand on behalf of the Government and testified as follows: [214]

Direct Examination

Q. (By Mr. Murlless): Your name is Mr. Hammon? A. Right.

Q. Will you spell it? A. H a m m o n.

Q. What is your work, sir?

A. I am employed by the Valley National Bank.

Q. I didn't hear your first name.

A. Don.

Q. Don Hammon? What is your work with the Valley National Bank?

A. Manager of the Note Department.

Q. And for how long has that been your work?

(Testimony of Don Hammon.)

A. Since the latter part of 1948.

Q. And with regard to the case of America vs. Claude E. Spriggs will you, was a subpoena duces tecum directed to you in connection with your work there at the bank? A. Yes.

Q. In connection with your work are you in that official capacity custodian of certain official records of the Valley Bank?

A. Records that are kept in the Note Department.

Q. And is it, is it in the note department, a business where it's in the business of keeping of records? A. Yes. [215]

Q. Did you bring some notes? A. Yes.

Q. What generally?

A. A loan ledger of Mr. Spriggs and a credit file.

Q. And at what particular file, if any?

A. Well, this would cover actually, as far as I can see by the file any from the beginning of his borrowing up until up-to-date.

Q. Do you have the record there, sir, of the loan upon a collateral security, a note from Arreola to Spriggs?

Mr. Parker: If it will shorten it, we will dispense with formalities, and let the gentleman state what it shows without putting it in evidence and speed it up.

Mr. Murlless: Does it show a loan upon a collateral security, a note of Mr. Arreola to the Defendant Spriggs? A. Yes, it does.

(Testimony of Don Hammon.)

Q. In what sum is that note?

A. \$4,500.00.

Q. And was it, was that note discounted at your bank, or not? A. No, sir.

Q. In what condition was it at the end of 1947?
[216] What was its circumstances?

A. \$4,500.00.

Q. It was valued at \$4,500.00? A. Yes.

Q. And was it encumbered—will you state what happened to that note between a month before the end of 1947 and the end of 1948, between those two times?

A. I don't understand your question.

Q. Was the note discounted to your bank?

A. No.

Q. It was pledged?

A. Yes, as collateral.

Q. When? A. September 16, 1947.

Q. And for what sum of money?

A. \$4,500.00.

Q. Was that loan paid off? A. Yes.

Q. When?

A. Well, I'll have to say that it was renewed at one time before final payment was made, but the final payment was on May 14, 1948.

Q. When renewed?

A. March 22nd, 1948.

Q. Did it still have the same collateral? [217]

A. Yes.

Q. One other question: the bank did collect the payments on the note that was pledged?

(Testimony of Don Hammon.)

A. I'm not sure of that.

Q. Very well, sir. Thank you very much. Your witness.

Cross Examination

Q. (By Mr. Parker): Mr. Hammon, will you state whether or not in the years, say, 1944, '45, '46 and '47, '48 there were various loans by Mr. Spriggs from time to time? A. Yes.

Q. Could you tell the jury approximately what the aggregate of these loans would be during that period, say to the close of '47?

Mr. Murlless: I think that is irrelevant, if your Honor please.

The Court: Answer it.

The Witness: \$12,000.00.

Mr. Parker: Now, mortgage loans, for instance, if there is some evidence that he may have borrowed on his home or other real property during that period through your department, would that be through your department? A. No. [218]

Q. Your records here wouldn't cover any mortgage loan on his home or Pierce Street property?

A. No, it wouldn't.

Q. The records that you have here wouldn't cover personal loans, would they, Mr. Hammon?

A. They would, we do have personal loans of a nature through the Commercial Department, but not ordinarily.

Q. I'm talking about the standard type of personal loans. A. No, it wouldn't.

Q. This \$12,000.00 in loans during those years

(Testimony of Don Hammon.)

is completely apart and aside from any real estate loans or loans through the personal loan department? A. Yes, sir.

Q. Now, as I understand it, these \$12,000.00 in loans during those years, they were unsecured loans of the kind that are often referred to as a loan on an open note, is that what they were?

A. No, with the exception of the \$4,500.00.

Q. That is the only security?

A. That is right.

Q. Or collateral that was pledged?

A. Right.

Q. Otherwise unsecured? A. Yes. [219]

Q. Short term notes? A. Yes.

Q. Loans, for instance, obtained for the purpose of fixtures and equipment for court or apartment, would that be handled through your department or some other department?

A. The money that he borrowed from our department could be used for anything.

Q. I see; but suppose he went to a hardware store and bought 10 or 5 water heaters and the conditional sales contract was sold to your bank, would that be handled through your department?

A. Not through our department ordinarily.

Q. What department would handle that?

A. The Installment Loan Department.

Q. Yes. That is all.

Redirect Examination

Q. (By Mr. Murlless): How much of those loans

(Testimony of Don Hammon.)

were repaid by the end of 1947, what was outstanding at the end of '47? A. \$4,500.00.

Q. That is all that was outstanding?

A. Yes, sir.

Q. Thank you very much. May this witness be excused, if your Honor please? [220]

(Thereupon the witness was excused from giving further testimony.)

Mr. Murlless: The Government rests.

Mr. Parker: I waive motion that would ordinarily be made at this stage. Now, if counsel wishes I'm going to have to present some evidence for the record in that. We might possibly reserve it, but I believe that this would be the proper point.

The Court: Offer the evidence, what is that, to offer the evidence?

Mr. Parker: Yes, in support of the motion previously made, and then to make another motion as well. What I have in mind are certain portions of the record in the former case that so far have been considered but are not a part of the record here yet.

The Court: Whatever procedure that you want to follow, Mr. Parker, is alright with me.

Mr. Parker: If your Honor please, I believe the motions would be questions addressed to the Court and not the jury and I wonder if the jury could be excused, and I'll quickly offer the portions of, for the record.

(Thereupon the jury was excused.)

Mr. Parker: Could, at this time, these be [221]

marked for, I suppose, admission in evidence, the minutes of the former case, your Honor. In that same case, may the indictment be received in evidence?

The Court: Wait until we get Mr. Murlless' attention.

Mr. Parker: The indictment in the former, the case, I would like to have marked in evidence in this case for the purpose of this motion. I assume that would be the only reason and the Bill of Particulars.

The Court: Alright.

(Thereupon the documents were marked as "A", "B" and "C" in evidence on the motion for the defendant.)

Mr. Murlless: That is the indictment, is it the minutes, is it the indictment? And "C" is the Bill of Particulars——

Mr. Parker: In Bill of Particulars in case No. 9558.

The Court: What's No. 9558?

Mr. Parker: That's the former trial in this case. Is it in response for motion for Bill of Particulars?

The Court: Yes.

Mr. Parker: That's it. I should like to offer——

Mr. Murlless: To which we'd like to make objections.

Mr. Parker: You want to make them all at once——

Mr. Murlless: We'd like to offer the transcript of the record in the former case on appeal.

(Thereupon the above named document was marked as "D" on the motion.)

Mr. Parker: The mandate of the United States Court of Appeals. The decision of the United States Court of Appeals 198, Federal 2,982.

Mr. Murlless: Defendant's "E" which is identified in the motion. The decision is of the Court.

Mr. Parker: The stipulation and order of dismissal in the former case dated April 14, 1952. Stipulation and orders—for identification on the motion. Those are all marked for identification.

The Court: Mark identified.

Mr. Parker: I beg your pardon, I now offer in evidence with relationship to the motion raising the issue of res adjudicata, and double jeopardy the Exhibits A to E inclusive. G. A to G inclusive for identification here marked.

Mr. Murlless: Remember, your Honor, that they are all inadmissible, in respect to the indictment, being tried here in C100711, which your Honor, I [223] urge them and as inadmissible, first, that they have no relation to the issues being tried here and that in other manners with respect to those motions they are incompetent, and immaterial to the issues in this case.

The Court: Admitted, subject to rejection.

Mr. Parker: Now, if your Honor please, I have a motion. I wish to move to strike all of the testimony relative to the matters set forth in Subdivision A and B of Count 3 as set forth in the Bill of Particulars in the former trial.

The Court: Motion denied.

Q. And I wish to specifically move to—well, I was going to move with more particularity to strike certain testimony.

The Court: Go ahead and I'll rule again.

Mr. Parker: Very well. The testimony of the Fisher-M. H. Van Denburgh,—Jacob Eglar, Joseph Cohen, Carlotta Arreola, Harry C. Jones, insofar as the testimony of those witnesses applied to the matters set forth in Sub-sections A and B of Count 3 in the Bill of Particulars in the former case and the exhibits and I'll have to include Mr. Charles Custin in that and the exhibits in evidence that were received pursuant and in the course of receiving their testimony. [224]

The Court: Motion denied.

Q. If your Honor please, at this time we urge the Court that the doctrine of *res adjudicata* is applicable here, inasmuch as that the United States Attorney has had Mr. Spriggs reindicted for an identical offense as that which he has previously been partially acquitted on, and which under the decision of the United States Court of Appeals is motion for judgment of acquittal, all on the depreciation item should have been granted, at the conclusion of former trial, that it is inescapable effect of the Court's statement there to the effect that the evidence was wholly insufficient, said it didn't come even close to meeting the rule which they had laid down, the rule of proof which they had laid down previously in the case mentioned, and his motion was duly made for a judgment of acquittal, and that he subsequently made another

motion by judgment of acquittal, notwithstanding the verdict, and as the United States Court of Appeals indicated both those motions on the state of the record at that time were good and should have been granted on the proposition of recording as having been done that which the Court said ought to have been done; that the reversal above without any instructions [225] for renewed trial or remand for a new trial in law amounts to an acquittal when the entire record is considered. The doctrine of res adjudicata does not give parties to a law suit a second chance to come back and see if they can't do better on the trial than they did on the first. Everything which was adjudicated, as I understand it at that time or might have been—in other words, the fact that they perhaps didn't subpoena the number of witnesses over a period here would have had no consequences, wouldn't influence the matter at all, and therefore I respectfully submit that the plea of res adjudicata and the motion to dismiss the indictment is good in that particular. I further think it is good because it is an identical charge and there was no substantiations. It would have been very simple to have had Mr. Spriggs indicted under the depreciation item. It could have been described in an indictment readily and confined this case to that portion therefore which hasn't already been passed upon, determined, but rather than that they have chosen to reindict on the entire and identical count, which puts the Government, in my opinion, in the position where they cannot very well escape error. Because, they have tied the

depreciation with the other two [226] capital gains, items which Judge Hall signed and which the United States Court of Appeals apparently so understood, it has heretofore exonerated Mr. Spriggs concerning those matters in the former trial. I think therefore that the plea of *res adjudicata* and motion to dismiss for that grounds should be granted, your Honor.

The Court: Motion denied.

Mr. Parker: I also move that the——

The Court: I think you had better clear up these exhibit questions before you make a further motion of, I have here this 24—that's the statement. That's admitted. You have objected to that. And I have 23. How did this get up here to me? This is the one I asked you to speak to me about again.

Mr. Murlless: Yes, sir, that is right.

Mr. Parker: That is right.

The Court: What is it?

Mr. Murlless: It is a violation of your order yesterday.

The Court: You wanted——

Mr. Murlless: To have it marked out, the last two columns.

The Court: Well, Mr. Parker hasn't seen what changes you want made. [227]

Mr. Murlless: Yes, sir.

(Thereupon the document was handed to Counsel for Defendant.)

Mr. Murlless: Mr. Parker, you want the last two columns eliminated?

Mr. Parker: I want the 20% rates here, the 5%

eliminated and those two columns under there. I wanted for identification of the property and the cost only.

Mr. Murlless: Cost basis, as the Judge indicated?

Mr. Parker: I suggest if Counsel could tear it off—you would have to eliminate it, you couldn't just scribble. Of course, my objection went to the proposition that this is some computation of the witness which the defendant has not signed, and is not bound by it. It is not, it is a self-serving thing to buck up the testimony or it might be said to be explanatory of the testimony if it is explanatory of the testimony by Mr. Tucker. It is Mr. Tucker's exhibit, it would serve the cause of his own testimony.

The Court: It is admitted with the two right hand columns removed.

(Thereupon the document was marked as Government's Exhibit 23 in evidence.) [228]

Mr. Parker: If your Honor please, I move the admission into evidence Exhibit A to B inclusive.

The Court: I admitted them.

Mr. Parker: I beg your pardon.

The Court: Subject to the Government's objections. You wanted them—those don't go to the jury.

Mr. Parker: Yes.

The Court: I have these two documents to the County Assessor. You will have to state your claim about them again, Mr. Murlless. I am not clear what you feel the need is.

Mr. Murlless: We felt the need for them, we anticipated and actually received in Court an ob-

jection to the procedure, the further procedure without making a prima facie case, and we didn't identify the other income tax return because he anticipated the same thing and without them, particularly, and even now, your Honor, it took those admissions to identify the property except that we had those things to show, not only his legal description but its street address.

The Court: Well, as of now do you want to withdraw them?

Mr. Murlless: I move again their admission in evidence. [229]

The Court: Why do you need them at this stage of the case?

Mr. Murlless: They aid in the identification of the property.

The Court: You have other evidence identifying it?

Mr. Murlless: Yes, sir.

The Court: I included these, they have two other stuff——

Mr. Parker: If your Honor please, I will wind this up with a motion—I move the Court for a judgment of acquittal on a directed verdict upon the grounds that the evidence exclusive of the defendant's own incriminating admission, it doesn't constitute a prima facie case and constitute a corpus delicti and that its admission cannot be considered for the purpose of supplying that deficiency and that such being the status of the record it is insufficient for submission to the jury.

The Court: Motion denied. Do you intend to put on testimony, Mr. Parker?

Mr. Parker: A very short bit.

The Court: All right. Call the jury back. [230]

Defendant's Case

Mr. Parker: Mr. Beals.

ARTHUR R. BEALS

a witness of legal age having been first duly sworn to tell the truth, the whole truth and nothing but the truth took the stand and testified on behalf of the defendant as follows:

Direct Examination

Q. (By Mr. Parker): May this document be marked for identification?

(Thereupon the document was marked as Defendant's Exhibit A for identification.)

Q. Mr. Beals, I hand you Defendant's Exhibit 1 for identification, and ask you if you have ever seen that document before?

A. Yes, I have.

Q. You prepared it? A. Yes, I did.

Q. Is it in your handwriting?

A. Yes, sir.

Q. Is it signed by you?

A. Yes,—wait a minute, yes.

Q. Is it dated? A. Yes.

Q. Did you hand it to Mr. Spriggs or deliver it to him on or about the date it bears? [231]

A. Yes.

(Testimony of Arthur R. Beals.)

Q. And what is it?

A. It is a schedule of depreciation.

Q. Which you set up for him?

A. On certain properties which he had requested of me for the purpose of preparing his 1948 Income Tax Returns.

Q. You set it up as a kind of a model on depreciation, was that it or what you thought?

A. Not as a model on depreciation, but as a basis in keeping with the statements which he had previously given as a correct cost of these particular items.

Q. And the correct way, in your opinion, to depreciate them—this isn't a trick question.

A. Yes, yes, that's not binding in any way as to the length of life but amending the 10% depreciation which he had previously claimed.

Q. Not binding, but just illustrative of the way you felt it should be set up from your knowledge of the matter.

A. Yes.

Q. We offer this in evidence. That is all, Mr. Beals. [232]

Q. (By Mr. Murlless): Now this may take a few minutes here. Now, in this connection may I ask a question on voir dire, if your Honor please? I see a column there that's devoted to amounts.

A. Yes.

Q. Sums of money. What do those reflect?

A. Those reflect the true cost of these items of property as Mr. Spriggs had related them to Mr.

(Testimony of Arthur R. Beals.)

Tucker and to me through the course of this investigation.

Q. Now, in going back one column I see a column of dates. What does that reflect?

A. That reflects the date on which these particular assets were acquired through construction or purchase.

Q. As he related it to you?

A. As he related them to us.

Q. And each item he had agreed to?

A. Yes.

Q. You go back one more column—what does that refer to?

A. That identifies the particular units, particular items of property, the location of these properties and as relates to the Henshaw Road Property it itemizes the particular units as to the cost which Mr. Spriggs had given us under his [233] own estimate, both as to the cost of the particular units and as to the cost of furniture which he had put into these.

Q. I understand. A. Properties.

Q. No objections, I'd like to ask a question on cross examination before we quit.

The Court: Admitted.

Cross Examination

Q. (By Mr. Murlless): Now, sir, with respect to Defendant's A in evidence, what does the last column represent?

A. It is headed Depreciation Reserve as of De-

(Testimony of Arthur R. Beals.)

December 31, 1947. It represents the proper amount of depreciation which would have been allowable and on the valuations as set forth in this statement up to that particular point in time.

Q. Then it wasn't the, it doesn't state the depreciation for 1947, it states an aggregate depreciation allowable since the obtaining of each of the items of property?

A. Yes.

Q. It was intended to serve Mr. Spriggs in the [234] figuring of an amended return for the year of 1948?

A. Yes, sir.

Q. In that same connection, what were the rates of depreciation for items that were put in this over your signature?

A. They are not expressed as "rates", they are expressed as estimated life which in substance is the same.

On these, as to the property in the nature of furniture and fixtures the 10 year life has been obtained.

Q. Is it what the exhibit says?

A. It says 10 years.

Q. What does it say for lands or improvements on lands?

A. For lands, no depreciation, but for improvements on land, 20 years estimated life which would be a 5% depreciation rate rather than a 10%.

Q. Your witness.

(Testimony of Arthur R. Beals.)

Redirect Examination

Q. (By Mr. Parker): Mr. Beals, are you with the Government now?

A. I am not with the Federal Government, if that's what you mean. [235]

Q. What are you doing at the present time?

A. I am now professor at the Arizona State College at Tempe.

Q. How long have you been professor over at the College? A. Three years.

Q. And were you a professor before you became a Government Agent? A. No, I wasn't.

Q. You have just become a professor from the Government service? A. That is correct.

Q. That is all.

Mr. Murlless: Thank you very much.

Mr. Parker: Mrs. Claude Spriggs.

MRS. CLAUDE SPRIGGS

a witness of legal age, having first been duly sworn to tell the truth, the whole truth and nothing but the truth took the stand and testified on behalf of the Defendant as follows:

Direct Examination

Q. (By Mr. Parker): What is your name?

A. Mrs. Claude Spriggs.

Q. And are you the wife of Claude E. Spriggs?

A. I am.

Q. And will you just speak out, Mrs. Spriggs.

(Testimony of Mrs. Claude Spriggs.)

The jury will want to hear what you say. How long have you and Mr. Spriggs been married?

A. Twenty-five years.

Q. And when did you move to Phoenix?

A. I believe it was '43.

Q. 1943, and from where did you come to Phoenix? A. From Safford, Arizona.

Q. And had you resided in Safford all of your life prior to coming to Phoenix?

A. Yes, sir.

Q. You were born there, were you?

A. Yes, I was.

Q. And was Mr. Spriggs also a native of Safford? A. No, sir.

Q. How long had he been there to your recollection?

A. Well, most of my life he was there.

Q. Most of your life. And does, is your father dead or alive? A. He is alive.

Q. Mrs. Spriggs, prior to your coming to Phoenix, did you receive a gift of a ranch?

A. Well, I received a gift of money and I [237] bought a ranch with it.

Q. You bought a ranch with it? Where did the money come from?

A. My father gave it to me.

Q. He gave it to you, and then did you sell that ranch? A. Yes, sir, I did.

Q. Do you remember when you sold it, approximately when you sold the ranch?

A. It was about in 1943.

(Testimony of Mrs. Claude Spriggs.)

Q. About the time you came to Phoenix?

A. Yes, sir.

Q. That was your property, your separate property?

A. Yes, sir, it was in my name.

Q. What did you get for the ranch?

A. \$24,250.00, something like that.

Q. Do you recall how much was paid down?

A. No, I don't.

Q. Do you recall how it was paid out, whether in monthly or annual or semi-annual—

A. It was paid in big payments.

Q. Do you remember approximately what the payments were annually?

A. Oh, I'd say around \$7,000, something like that. [238]

Q. Were those payments made during about '44, '45, '46, something in there?

A. Yes, sir, along in there.

Q. Did you sell any other property which was your separate property?

A. Yes, sir, I sold a small office building.

Q. In Safford? A. Yes.

Q. When did you sell that?

A. Oh, I think it was about '46, '47; someplace along there.

Q. '46 or '47? A. Yes.

Q. And you got \$3,750.00 for that?

A. That is right.

Q. And did any of this money that you received from the sale of your ranch and your office build-

(Testimony of Mrs. Claude Spriggs.)

ing go into the improvement of this Henshaw Road property?

A. Yes, sir, they were building it and used the money for that.

Q. Do you have any recollection as to how many thousands of dollars of your money, your separate money went into that project there?

A. I turned it over to the community and put it there. [239]

Q. You turned it all over to Mr. Spriggs and it went into—— A. Yes, sir.

Q. In addition to that money did you sell a home there in Safford during this period?

A. Yes, we did.

Q. Do you recall what you got for that, approximately?

A. It was around forty-five or forty-eight hundred dollars.

Q. And did that money go too, the same way the other did? A. Yes.

Q. And did Mr. Spriggs borrow in addition to the money that you got out of the sales of this property to carry on this Henshaw Road construction?

A. Yes, we borrowed on our home and other rentals that we had and put it into that.

Q. Now, Mrs. Spriggs, I'll ask you, did you undertake during the improvement of this Henshaw Road property to keep any records at all of any part what was spent on it?

A. Yes, sir. I kept records of materials that we

(Testimony of Mrs. Claude Spriggs.)

bought, I used to go in the car and pick them up to the men that were working. But I don't [240] have the books, we turned them over to the Government.

Q. What did they look like?

A. A ledger book about this long (indicating) and a little black one that I carried in the car and wrote down these things.

Q. Well, did the Government agents return records which Mr. Spriggs had given them?

A. They returned all of them but those two.

Q. Never returned those two books?

A. No, sir.

Q. Do I understand it is your testimony that you personally delivered to them those two books?

A. They were there at the house and they were in the study and I went upstairs and brought the books down and handed them to them.

Q. To whom? A. To Mr. Beals.

Q. To Mr. Beals, and do you remember—I know its been some time ago, but do you remember roughly or approximately when it was?

A. No, I wouldn't like to say. Along the beginning of the investigation. They were still coming out and getting——

Q. Have you ever seen those two books since?

A. No, I have not. We looked for them. We [241] wanted to take them to Washington, and couldn't find them.

Q. Are they present here in the courtroom. You can see, on Counsel's table or the Clerk's desk?

(Testimony of Mrs. Claude Spriggs.)

A. No.

Q. You don't see them? A. No.

Q. And you say you got the other things back but not these two things where you kept the expenditures——

A. We did not get them back.

Q. Do you, did you, Mrs. Spriggs, ever have occasion to total up or arrive at a final balance of investment in that Henshaw Road property?

A. No, sir, I didn't because we thought that when it was all finished we would turn it over to a bookkeeper and they picked up the stuff so it wasn't totaled up.

Q. Was it all finished at the end of '47, or did some of it continue on until '48?

A. We were always improving it, and doing things, I can't say when it was finished.

Q. Do you have any memory at all that would serve to enable to, you to give the Court and the Jury your estimate of what went into that [242] property?

A. No, I wouldn't like to say, if I had the books, it would be a different thing. I just don't like to make a statement on it.

Q. Would you say that it was as small an amount as eighteen thousand and some odd dollars?

A. I certainly wouldn't.

Q. How is that?

A. I certainly wouldn't.

Q. Do you think it was a great deal more than that? A. Yes, I do.

(Testimony of Mrs. Claude Spriggs.)

Q. And, by the way, about 1947 or '48, did you and Mr. Spriggs have an offer to purchase that property from someone?

A. We had an offer, somebody wanted to buy it from us.

Q. Yes, at what price?

A. They offered \$55,000.00 for it.

Q. Was that to be a cash or deferred payment proposition?

A. It was cash.

Q. In other words, then, do you remember whether it was in '47 or '48 that that offer was made?

A. The place wasn't completed. [243]

Q. It still wasn't completed?

A. No.

Q. At a time when you were offered \$55,000.00 cash for the property?

A. Yes, we were.

Q. You may cross examine.

Mr. Murlless: No questions.

Mr. Parker: Were the technical matters of renewing the motions made at the conclusion of the Government's case, which motions and each of them we do at this time renew, the defendant is ready to rest, your Honor.

The Court: Have a rebuttal, Mr. Murlless?

Mr. Murlless: No, your Honor.

The Court: Now, Mr. Parker, I don't want to be technical, but you'd better restate your motions now. Now that Mr. Murlless said that he didn't have a rebuttal. The case wasn't quite concluded when you spoke.

Mr. Parker: At this time I wish to renew all the motions heretofore made at the close of the

Government's case, particularly the motions, the motion predicated upon the doctrine of *res adjudicata*. It is our contention that this matter has been in whole or part been adjudicated favorably to the innocence of this defendant. [244]

The Court: The ruling will be the same. Ladies and Gentlemen, we won't be able to conclude this today. You are excused until 1:00 o'clock next Monday afternoon. [245]

* * * * *

Court's Instructions to the Jury

The Court: These income tax cases, Ladies and Gentlemen; the important thing is whether the taxpayer intended to commit a fraud on the Government. These charges are very serious charges; they are felonies, and our law has always treated a felony charge as a, very properly, as a very serious matter, and there must be proof in such cases of specific criminal intent. That is to say, that the defendant did what he was charged with, not only knowingly, but wilfully, and with a bad heart and bad motive and knowing that he was violating the law and intending to violate the [297] law, and in this particular type of case, that he was attempting to defraud the Government out of the tax that he lawfully owed to it. This defendant, like in every criminal case, has the benefit of presumption of innocence. He is presumed to be innocent until proven guilty to your satisfaction beyond a reasonable doubt and to a moral certainty. That is to say, the defendant doesn't have to prove himself inno-

cent. The Government, which is the charging party, has to prove him guilty. The Government has the burden of proof of all the material allegations of the indictment. The burden of proof means that it must satisfy you beyond a reasonable doubt of the truth of the material allegations of the indictment. Reasonable doubt means such a doubt as would cause an average, reasonable person to hesitate in making an important decision in his own, or her own, affairs. This indictment is not long. You will have it with you in the jury room. It is not to be considered as evidence in the case, but merely for your guidance and help. The Court's charges against the defendant, is as I spoke a moment ago, are the material allegations of it. The things that the Government has to prove before you may return a verdict of [298] guilty is to prove on the burden of proof. This, as you will understand now, is for 1947 income tax, and so the charge, summarizing, is that, on or about January 7, 1948, the defendant did "wilfully and knowingly attempt to defeat and evade;" those are the words of the Statute, Ladies and Gentlemen, "a large part of the income tax due and owing by him to the United States for the calendar year 1947." Now, those are things, before the Government is entitled to a verdict of guilty, you must find were one by the defendants with criminal intent, knowing that what he did was wrong; that he attempted to defeat and evade his tax wilfully and knowingly and unlawfully.

Now, how do they claim he tried to do that? To

defeat his tax? By filing a false and fraudulent income tax return. And so, those are material allegations. The Government has the burden of proof, regarding of which the Government has the burden of proof.

You may not find him guilty unless you are convinced beyond a reasonable doubt that the return that he filed that year was false and fraudulent and also, as I said to you previously, made with criminal intent, filed with criminal intent. And what are the details? Alleged false and fraudulent [299] return. He stated that his net income for the year was the sum of \$1,928.17, and that no tax was due on it, whereas, as he then and there well knew—there again, you have the element of knowledge as a material allegation—it is a material allegation, of course, that he filed a return, and as to the amounts of it I will say something in a minute; but that is material that he then and there knew, and the Government has a net, and he well knew the net income for the said year was a different sum—not the \$1,928.47, but, as alleged here, \$7,049.15.

You know—those are the material allegations of the indictment except as to those figures; the Government is not held strictly to those figures if its evidence here is different from those figures. I'll refer to my notes in a minute and refresh your recollection as to what these figures are. The end of the indictment said that, "upon which net said income was \$7,000 odd dollars there was owing to the United States of America an income

tax of \$1,058.03, whereas he made a return showing he didn't owe any tax." Now, the Government's figures that are relied on from the evidence have to do with three items. You remember this perhaps quite as well as I do, [300] but I have had the opportunity to make notes, and you haven't. So, if you will bear with me, I'll just state what the items were. They claim that he had, the defendant had a taxable gain, what they call a short term taxable gain, of \$547.48. That is on the piece of property of the unimproved lot, as you may remember. I don't remember who he bought it from, but I remember he sold it to that lawyer, Van Denburgh. The Government claims that he sold that within the six months' period and so there was, he should have shown on his return, \$547.48. on taxable income on that. Then, as to that property out this way on Washington Street where the little Mexican woman was the buyer, and her husband, they claim that as to that he should have reported a long-term taxable gain, because he had held that property longer than six months, so only one-half of it was shown, but he should have shown the one-half of the profit. That is what I mean by taxable gain, \$1,690.00.

Now, then, on the Henshaw property, we have the map on the board; the Government's theory is that that is a matter of depreciation; that he took a greater depreciation than he was entitled to, because the Government claims he over-stated [301] the cost of it. Stated, so the Government claims, that it cost him \$40,000, as to which he took a de-

preciation of ten per cent, or \$4,000, whereas the Government claims it only cost them \$20,000 in round figures, a little less than \$20,000, and that the correct depreciation at the same rate of ten per cent, not making any point of that, because I have not allowed that to come into the case, taking his own figures as to the cost that, it doubled the cost, or more than doubled the actual cost, and that the depreciation on his on which he was entitled was \$1,855.01, so the claims that he over-depreciated, claimed an excess of depreciation, the difference between those two figures of \$2,162.32. So, the items then, re-capping, they said had a bearing on his taxable income, were the first item, \$547.48, and the second, \$1,698, and the third item of over-depreciation of \$2,160.32. Now, I haven't totaled those three items, but, anyway, how the whole of it comes out, of which is really the important thing is, here the Government claims that those items, having been correctly stated would have shown him owing \$910.09, whereas the way he set up the figures, he showed he didn't owe any tax. That is what this [302] case is about. Whether or not the fact that he didn't show those items correctly which would have resulted in a tax of \$910.09, constituted a wilfull fraud by him—if you are convinced beyond a reasonable doubt and a moral certainty that it is intentional and that there was fraud as to the facts, the underlying facts, that he did make that taxable gain as to the sale of the two pieces of property, and that his cost was not \$40,000, but substantially less figure than that, then

it is your duty to return a verdict of guilty.

And I may say that the Government does not have to prove, satisfactorily, all three of those items. To satisfy you by any two of them, or any one of them, beyond a reasonable doubt it was done wilfully and with the intention and as an attempt to defraud the Government and evade his taxes, he will be entitled to a verdict of guilty, and it is your duty to return one. On the other hand, equally, if you are not satisfied with those beyond a reasonable doubt, it is your duty, the defendant given due effect to the presumption of innocence, thereby equally, your duty to return a verdict of not guilty. You will take the exhibits, please, to the jury room and give them the weight [303] you feel they are entitled to along with the evidence you have heard from the witness stand. Your verdict must be unanimous and be signed by your Foreman, whom you will elect. The defendant didn't take the witness stand. You are not to give any effect, that the defendant in a criminal case has that right under our law. He doesn't have to take the witness stand. He is entitled to present his case, if that is his idea, some other way. Just put that out of your mind and don't give weight to that one way or another.

It is your duty as jurors to consult with one another and deliberate and reach an agreement, and you can do so without violence to your individual judgments in this case. You must decide the case to yourselves; but you should do so after a careful; each of you must decide the case for yourself.

After careful consideration of the case by your fellow jurors. And you should not hesitate to change an opinion when convinced that it is erroneous. However, neither should you be influenced by voting for a single reason because the majority of the jurors are. You should not surrender an honest conviction and waive the guilt or innocence of the defendant for the mere purpose of returning a [304] verdict, or solely because of the opinion of other jurors. You are the tryers of the facts. You are the exclusive judges of the credibility of the witnesses and of the weight and value of their testimony. There has been some reference here to the defendants relations with some people who were employed by him. He is not on trial for that, ladies and gentlemen. I am sure you understand. He is just on trial here for the alleged offense of attempting to defeat and evade the income tax by wilfull fraud. We all have our troubles with other people in the world, and when a man is on trial for a charge, that is the case to be tried and that is your duty here and that alone. You may retire to the jury room.

(Thereupon the jury retired for its deliberations at 3.05 o'clock p.m.)

The Court: Mr. Parker, you are entitled to objections to the instructions.

Mr. Parker: I wish to compliment the Court on its instructions. I have no exceptions or any issues to take with them.

The Court: The Court is in recess.

[Endorsed]: Filed June 24, 1954.

[Endorsed]: No. 14409. United States Court of Appeals for the Ninth Circuit. Claude E. Spriggs, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: July 1, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14409

CLAUDE E. SPRIGGS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STIPULATION

It Is Hereby Stipulated, by and between Jack D. H. Hays, United States Attorney for the District of Arizona, Attorney for Appellee, and Claude E. Spriggs, Appellant, that the attorney's argument to the jury inadvertently printed in the Reporter's Transcript be deleted from the printing of the record on appeal.

It Is Further Stipulated by and between the parties hereto that the appellant's designation of record on appeal and appellee's designation of ad-

ditional portions of record on appeal, together with appellant's designation of points upon which appellant relies upon appeal, which were heretofore filed with the Clerk of the United States District Court of Arizona, and thereafter sent to this Court, under his certificate of record on appeal and set out in said certificate as Item No.'s 24, 25 and 26 be adopted for the appellant's statement of points and designation in this Court as provided by this Court's Rule 17 (6), as suggested in the Clerk's letter of July 1, 1954.

JACK D. H. HAYS,

United States Attorney

/s/ By ROBERT S. MURLLESS,

Appellee

/s/ CLAUDE E. SPRIGGS,

Appellant

[Endorsed]: Filed July 7, 1954. Paul P. O'Brien,
Clerk.

No. 14,409

In the

United States Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona.

FILED

OCT 1 1954

PAUL P. O'BRIEN
CLERK

CLAUDE E. SPRIGGS
730 West Coronado Road
Phoenix, Arizona

In propria persona

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In the

United States Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona.

JURISDICTIONAL MATTERS

In the United States District Court, for the District of Arizona, Honorable Claude McColloch, United States District Judge, specially assigned, presiding:

The appellant, CLAUDE E. SPRIGGS, was, on the 12th day of April, 1954, adjudged guilty of the offense of violating Title 26, U.S.C. para. 145(b) (attempt to defeat and evade income tax) upon the indictment (TR 3, 4); and thereafter, on the 12th day of April, 1954, the appellant filed his Notice of Appeal to this Court (TR 45 thru 47) from the judgment and conviction entered on the 12th day of April, 1954, and from the order denying his Motion for Judgment of Acquit-

tal notwithstanding the Verdict, entered on the 12th day of April, 1954, and from the order denying Motion for a New Trial, denied on April 12, 1954 (TR 41-42) and from the judgment and sentencing made and entered herein on April 12, 1954 and from the whole thereof (TR 42-43).

The District Court had jurisdiction under Title 26, U.S.C. para. 145(b) (attempt to defeat and evade income tax); this Court has jurisdiction under Title 28, U. S. C., para. 1291.

STATEMENT OF THE CASE

That on the 26th day of February, 1953, the Grand Jury indicted the appellant upon one count for violation of 26 U.S.C. para. 145(b) (attempt to defeat and evade income tax) (TR 3, 4). That thereafter the Honorable Dave W. Ling specially assigned the matter to the Honorable Claude McColloch for disposition and trial. That on the 20th day of March, 1953, the appellant filed his Motion to Dismiss the Indictment, upon the ground and for the reason that the defendant had previously been acquitted and in jeopardy of conviction of the offense alleged therein, in the case of United States of America v. Claude E. Spriggs, in United States District Court for the District of Arizona, Case No. C-9558, Phoenix, and terminated on the 19th day of November, 1951, at Phoenix, Arizona, by a judgment entered and filed at Phoenix, Arizona, on November 21, 1951 (TR 4). The case lay dormant thereafter until the Honorable McColloch came to Phoenix, Arizona, for the trial of cases. That on January 7, 1954, the United States attorney Jack D. H. Hays, by and through Robert S. Murlless, assistant United States Attorney, filed an answer in opposition to a motion by the defendant to dismiss the indictment (TR 5, 6). That on the 15th day of January, 1954, the defendant filed his Plea in Bar (TR 6 thru 11). That on February 8, 1954, the

defendant was arraigned and the Court ordered that the case be continued for three days for the plea to allow defendant to file a Motion for Bill of Particulars and all motions herein were set for hearing on February 10, 1954 at 12:30 P.M. (TR 12-13). That on the 8th day of February, 1954, the defendant filed his motion for a bill of particulars (TR 11, 12). That on the 9th day of February, 1954, the United States attorney filed an answer in opposition to Motion for Bill of Particulars (TR 13 thru 16). That on the 10th day of February, 1954, a hearing was had on the defendant's Motion to Dismiss; Plea in Bar; and Motion for Bill of Particulars, and all three were by the Court denied (TR 18). That at said time the Court, from the bench stated that since the United States attorney was objecting to the furnishing of the Bill of Particulars, and since the Bill of Particulars had been furnished in the prior case (No. C-9558, Phoenix), that he would deny the defendant's Motion for Bill of Particulars and they would use the Bill of Particulars furnished in said prior trial as to Count III, as to said Bill of Particulars, the same being the same indictment now before the Court and the said Bill of Particulars as aforesaid, was used during the entire procedure of the present case. That the Bill of Particulars of the prior trial, as used in this matter, is set out (TR 16, 17) and used by the Court in the trial of this matter (TR 195, 196). That on the 10th day of February, 1954, the defendant entered a plea of not guilty (TR 18). That thereafter, on the 25th day of February, 1954, notwithstanding the denial of the plea in bar made on February 10, 1954, the United States attorney, Jack D. H. Hays, by and through Robert S. Murlless, assistant United States Attorney presented to the Court an Order which granted the defendant's plea in bar in part and denied in part in that plea in bar was granted in respect to the specific items of alleged un-reported income and

was denied with respect to the specific items of alleged fraudulent depreciation as appears in the indictment in the above entitled cause (TR 18, 19). That on the 12th day of March, 1954, the United States attorney filed his Motion of Plaintiff for re-hearing of defendant's Plea in Bar (TR 19 thru 28). That on the 22nd day of March, 1954, a hearing was had on the United States' attorneys Motion of Plaintiff for re-hearing of defendant's plea in bar and the Court ordered that the order of February 25, 1954, granting said plea in bar in part and denying said plea in part, be, and it is vacated (TR 28, 29). That on the 29th day of March, 1954, the defendant filed a Motion to Dismiss (or quash) Indictment (TR 29 thru 32). The trial began on March 31, 1954, the Court reserving its decision on defendant's motion to dismiss (or quash) indictment (TR 32). That after the United States attorney had made his opening statement, without reading the indictment to the Jury, the attorney for the defendant moved the Court to declare a mis-trial and further moved the Court to instruct the jury to return a verdict of acquittal which motions were denied (TR 59). That the trial proceeded and the United States attorney presented evidence to sustain the allegations of the indictment and presented evidence over the objection of the defendant as to the items under the Bill of Particulars of a, b, and depreciation overstated in the three matters as set out in the Bill of Particulars (TR 17). At the close of the evidence, presented by the Government, the defendant moved the Court to strike all the testimony relative to matters set forth in subdivision a and b of Count III as set forth in the Bill of Particulars in the former trial, which the Court denied (TR 229). The attorney for the defendant further moved the Court, at the end of the Government's case to dismiss the indictment upon the ground and for the reasons of res judicata, former

jeopardy, and or insufficiency of the evidence, which the Court denied (TR 230 to 232), and at the end of the whole case the attorney for the defendant renewed all the motions heretofore made at the close of the government's case, which the court denied (TR 245, 246).

The cause was submitted to the jury upon items a, b and depreciation overstated, and the jury thereafter returned a verdict of guilty (TR 37). That on the 8th day of April, 1954, the defendant filed his Motion for Judgment of acquittal notwithstanding the Verdict (TR 37, 38 and 39). That on the 8th day of April, 1954, the defendant filed his Motion for a New Trial (TR 39, 40 and 41). That on the 12th day of April, 1954, the Court denied the Motion for Judgment of Acquittal notwithstanding the Verdict and Motion for a New Trial (TR 41, 42). The appellant was on April 12, 1954 adjudged guilty of the offense of violating Title 26, Section 145(b) U. S. C. (attempt to defeat and evade income tax) as alleged and was thereafter sentenced therefor (TR 42, 43). That on the 12th day of April, 1954, the defendant filed his Notice of Appeal (TR 43, 44, 45).

The Government's case and evidence as to the depreciation overstated rested solely on the testimony of one Internal Revenue Agent, to-wit: Lloyd M. Tucker. No other evidence or Exhibits were introduced to the Jury with the exception of appellant's income tax return for the year 1947. Testimony of said agent concerning the allegations as covered by the Government's Bill of Particulars consisted solely of the following:

Depreciation overstated: "This item consists of the overstatement of depreciation by the defendant as a result of his having falsely represented the cost of his property located on Henshaw Road, Phoenix, Arizona, on which he claimed excess depreciation in the amount of \$2,978.60."

which was derived solely from admission, conversation and statements with the appellant (concerning the so-called Henshaw Road Property) (TR 180 thru 220). That the relating of statements, admissions and conversations with the appellant by the agent Lloyd Tucker, was raised by appellant by the following objections (TR 182) :

“Mr. Parker: I object. It has no proper foundation laid, and if this is leading up to something which counsel claims in the nature of a confession or something, I don’t know what it is. I object to it on the ground that the status of the record in my humble opinion does not show adequate proof of corpus delicti and doubt the ability—and this is no—

The Court: Overruled.”

There is no other evidence except as to those conversations, statements and admissions between the witness and appellant before the Court as to the aforementioned items of depreciation. The cause was thereupon submitted to the Jury.

All other evidence adduced at this trial was to items a and b of the Bill of Particulars of which the defendant had heretofore been acquitted by this United States Court of Appeals for the Ninth Circuit, in the case of *United States of America vs. Spriggs*, 198 Fed. (2) 782.

ISSUES INVOLVED

The issues involved on this appeal relating to items of capital gain and depreciation as set forth in Governments Bill of Particulars, supporting the indictment are:

1. Had the defendant been put in double jeopardy since there had been a prior acquittal upon items (a) and (b) of the Bill of Particulars?

This was raised by appellants Motion to Dismiss indictment (TR 4) and defendant’s Motion for a Mis-trial, and

defendant's Motion for a Directed Verdict (TR 59), and by defendant's Motion to Strike (TR 229); and, by reason of Motion for Judgment of Acquittal notwithstanding the Verdict.

2. Does *res judicata* apply where defendant had previously been acquitted of the same offense as in (a) and (b) of Government's Bill of Particulars?

This was raised by appellants Motion to Dismiss (or quash) indictment (TR 29 thru 32) and defendant's Motion at the end of the Government's case, (TR 230) and by reason of Motion for Judgment of Acquittal notwithstanding the Verdict.

3. May the Court, by its actions, re-indict a defendant after a plea in bar has been sustained?

This was raised by the order of the Court (TR 18, 19) and later vacated by order of the Court (TR 28, 29).

4. Is the evidence sufficient to sustain the verdict and judgment?

This was raised by appellant's objection to the evidence (TR 182) and appellant's Motion for Judgment of Acquittal (TR 230, 231 and 232), and by Motion for Judgment of Acquittal notwithstanding the Verdict (TR 37, 38 and 39).

SPECIFICATIONS OF ERROR

I.

The District Court erred in admitting testimony over the objection of appellant (TR 59) of such witnesses testimony as relating to items (a) and (b) of the Government's Bill of Particulars which related to capital gains for this testimony was inadmissible for the reason that these matters had already been adjudicated in a prior case and therefore to allow this testimony put the defendant in double jeopardy.

II.

The District Court erred in admitting the testimony, over the objection of appellant (TR 59), of such witnesses testimony as related to items (a) and (b) in the Government's Bill of Particulars, for this testimony was inadmissible, for the reason that said defendant had been tried for these offenses before and acquitted thereon and to allow such testimony is against the doctrine of *res judicata*.

III.

The District Court erred in vacating the order granting defendant in part his Plea in Bar of February 25, 1954, (TR 18, 19) by his order of March 22, 1954 (TR 28, 29), for the reason the Court has no jurisdiction to re-indict a defendant since this can only be done by a Grand Jury.

IV.

The District Court erred in admitting the testimony, over the objection of appellant, (TR 182) of such witness' testimony of related conversation, admission and statements, for said testimony was inadmissible upon the ground there had been no showing of any crime having been committed (TR 182).

V.

The District Court erred in refusing to grant appellant's Motion for Judgment of Acquittal at the end of the Government's case (TR 230 thru 232) and at the end of all the evidence adduced before the jury (TR 245, 246), upon the ground that the evidence was insufficient to sustain a conviction.

VI.

The District Court erred in refusing to grant appellant's Motion for Judgment of Acquittal notwithstanding the Verdict (TR 37, 38, 39) upon the ground that the evidence was insufficient to sustain the verdict.

VII.

The District Court erred in refusing to grant appellant's Motion for a New Trial (TR 39, 41); upon the ground that the evidence was insufficient to sustain a conviction.

ARGUMENT

I.

The District Court erred in admitting testimony over the objections of appellant of such witness' testimony as relating to items (a) and (b) of Government's Bill of Particulars which related to capital gains, for this testimony was inadmissible for the reason that these matters had already been adjudicated in a prior case and therefore to allow this testimony put the defendant in double jeopardy.

That on the 3rd day of April, 1951, in Cause No. C-9558 Phoenix, the Grand Jury indicted the defendant, Claude E. Spriggs on three Counts of tax evasion, for the years 1944, 1946 and 1947. That upon trial of the matter the defendant was acquitted on Counts I and II of the Indictment; that prior to the trial of defendant, defendant demanded and was granted a Bill of Particulars and the Bill of Particulars, as to Count III of the Indictment showed the net income for 1947 in the sum of \$7,048.95; that the Bill of Particulars further showed unreported taxable capital gains consisting of two items (a) taxable portion of profit on sale of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona, \$1,698.15; (b) taxable portion of profit on sale of Lot 5, Eastwood Place, Phoenix, Arizona, in the amount of \$544.64. The third portion of Count III of the indictment under the Bill of Particulars was depreciation overstated in the sum of \$2,978.60.

The present indictment and the previous indictment are for the same year, 1947, for the same amount of taxes due,

and for the same amount of income, except a difference of \$.20.

Therefore this defendant believes that the present indictment and Count III of the former indictment cover the same year, the same alleged violation and therefore a determination of the prior indictment would bar a prosecution of the present indictment, upon the ground and for the reason of double jeopardy as provided under the Fifth Amendment of the United States Constitution.

That on the 21st day of November, 1951, in Cause No. C-9558, Phoenix, a judgment was entered by the District Court of guilty and same was filed upon the 21st day of November, 1951.

Thereafter an appeal was made to the United States Court of Appeals for the Ninth Circuit and said matter was reversed and the Court therein stated:

“Upon trial, appellant was acquitted of Counts I and II upon his motion for a directed verdict of acquittal. He was also acquitted upon portions of Count III. That portion of Count III upon which appellant was found guilty is found in the allegations contained in the appellee’s response to defendant’s motion for a Bill of Particulars; ‘depreciation overstated.

This item consists of the overstatement of depreciation by the defendant as a result of his having falsely represented the loss of his property located on Henshaw Road, Phoenix, Arizona, on which he claims excessive depreciation in the amount.....\$2,978.60’ ”

U. S. vs. Spriggs, 198 Fed. (2d) 782.

That thereafter the mandate issued out of the United States Court of Appeals for the Ninth District and the same was filed and recorded upon the record of the District Court for the District of Arizona; thereafter on the 14th day of October, 1952, the United States Attorney, and

attorney for the defendant made and entered into a Stipulation wherein they said that by reason of the mandate of the appellate court, spread upon the records of the above entitled court on the 3rd day of October, 1952, the Court may by order of this Court, dismiss the action. That on the 15th day of October, 1952, the District Court for the District of Arizona, made and entered its order that the action, United States of America, plaintiff, vs. Claude E. Spriggs, defendant, Cause No. C-9558, Phoenix, is hereby dismissed * * *

This action was dismissed under Rule 48 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. Federal Rules of Criminal Procedure, page 537 under Rule No. 48 which became effective on October 20, 1949, and was in force and effect at the time this order of dismissal was made.

In the case of *United States vs. Doe*, 101 F. Supp. 609, the Court held that a dismissal of criminal prosecution can be approved by the Court only on showing that the government lacks evidence to warrant a prosecution. This case held further that Rule No. 48 of the Federal Rules of Criminal Procedure is that a judge must be convinced of public interest and that there has been a showing by the United States Attorney that he had insufficient evidence to warrant a prosecution.

The Court in the case of *State vs. Gates*, 25 NE (2) 471 states that where a defendant was discharged by reason of insufficiency of the evidence, the defendant had been put in legal jeopardy.

Rule No. 48 of the Rules of Criminal Procedure, paragraph (a) thereof, states that where the United States Attorney dismisses an action by leave of the Court the *prosecution thereupon shall terminate*. (Italics ours.)

Therefore, the prosecution under the present indictment, for the capital gains, being paragraphs (a) and (b) of the

Government's Bill of Particulars, after acquittal by the trial court in the District Court and said acquittal being affirmed by the Court of Appeals of the Ninth District, and subsequent dismissal by the District Court of the District of Arizona would certainly constitute double jeopardy as set out in the Fifth Amendment of the United States Constitution.

II.

The District Court erred in admitting the testimony over the objection of appellant of such witness' testimony as related to items (a) and (b) in the Government's Bill of Particulars, for this testimony was inadmissible for the reason that said defendant had been tried for these offenses before and acquitted thereon and to allow such testimony is against the doctrine of *res judicata*.

The doctrine and application of *res judicata* and the distinction between double jeopardy and *res judicata* are discussed in an opinion of Justice Douglas in *Sealfon vs. United States*, 332 U.S. 575; 92 L. Ed. 180. See also 147 A.L.R. 992.

In the case of *Partmar Corporation vs. Paramount Pictures Theatres Corporation* (February 8, 1954), 98 L. Ed. 301 (advance sheet No. 8, Vol. 98, L. Ed.) wherein Justice Reed speaking for the United States Supreme Court, affirmed the rule that a prior adjudication conclusively disposes of all matters which were or *might have been* litigated or adjudged therein.

The District Court for the District of Arizona and the United States Court of Appeals for the Ninth District, having determined by its decision and reversal of the prior judgment on the item of depreciation and the acquittal of items (a) and (b) of the Government's Bill of Particulars. It is inescapable that this prosecution is subject to the application of the doctrine of *res judicata*. Referring to

certain evidence which was admitted, but which the Court of Appeals failed to state whether it deemed admissible, the Court said:

“Even if the admissibility of such testimony be assumed *arguendo*, the government’s case still falls far short of establishing the guilt of appellant by the further evidence required by our decision in *Davena, Jr. v. United States*, No. 13,131, June 27, 1952, 198 Fed (2) 230.”

The Courts have held that the rule of *res judicata* applies to every question falling within the purview of the original action, in respect to matters of both claim and defense which could have been presented by the exercise of due diligence and the conclusiveness of the judgment in such case extends not only to matters actually determined but also to other matters *which could have been determined*, in the prior action. 30 Am. Jur. 923, under judgments, para. 179; 15 Am. Jur. 45, under Criminal Law, para. 367. *U. S. vs. Dockery*, 49 Fed. Supp. 907; *U. S. vs. Carlisi*, 32 Fed. Supp. 479; *U. S. vs. Oppenheimer*, 242 U.S. 85; 61 L Ed. 161; *Stone vs. U. S.*, 167 U.S. 178; 30 Am. Jur. 907, Judgments, paras. 161 to 165; 147 A.L.R. 991; *U. S. vs. Adams*, 281 U.S. 202; 74 L. Ed. 807; *Fall vs. U. S.*, 49 F. (2) 506; *res judicata* is a rule of evidence, Section 392 of the Code of Criminal Procedure.

III.

The District Court erred in vacating the order granting defendant in part his Plea in Bar of February 25, 1954, by his order of March 22, 1954, for the reason the Court had no jurisdiction to re-indict the defendant since this can only be done by the Grand Jury.

That on the 25th day of February, 1954, the United States Attorney, Jack D. H. Hays by and through Robert S. Murlless, Assistant United States Attorney, presented to the Court, in the absence of the defendant or of the defendant's attorney, an order for the Court's signature which granted the defendant's Plea in Bar in part and denied, in part, the plea in bar. This order was signed by the Court and filed in the District Court of the District of Arizona, on the 25th day of February, 1954. This order granted the defendant's plea in bar in respect to specific items of alleged unreported income and the order denied the plea in bar with respect to specific items of alleged fraudulent depreciation *as appears in the indictment* in the above entitled cause.

That thereafter, on the 22nd day of March, 1954, the Court ordered by a minute entry that the order of February 25, 1954, granting said plea in bar in part and denying said plea in part be *and it is vacated*.

Under the rules of Criminal Procedure whether you designate a motion as a plea in bar or as a motion to dismiss or by what other nomenclature you could use, the Court by its order dismissed the items (a) and (b) under the Government's Bill of Particulars. Therefore when the Court, by its order of March 22, 1954, vacated said order and reinstated the indictment had no jurisdiction to do same for the reason that a defendant can only be reindicted after a dismissal by submission of the case to the Grand Jury. Fifth Amendment of the United States Constitution. *Ex Parte Bain*, 21 Sup. Ct. Rep. 781, 121 U.S. Rep. 1.

The Court in the case of *Ex Parte Bain*, stated:

"The declaration of Article 5 of the Amendment of the Constitution that no person shall be held to answer—unless on a presentment or indictment of a grand jury—is *jurisdictional*, when this indictment is filed with the Court *no change can be made* in the body of the

instrument by order of the Court, or by the prosecuting attorney, without re-submission of the case to the Grand Jury—”.

Ex Parte Bain, supra.

IV.

The District Court erred in admitting the testimony over the objection of appellant of Government's agents related conversation, admissions and statements, for the reason that said testimony was inadmissible, upon the ground there had been no showing of any crime having been committed.

An extra-judicial confession will not be admitted unless corroborated by other evidence.

In the case of *Davena vs. United States*, 198 Fed. (2) 230 (Ninth Circuit) the Court held that to justify the admission of the confession under the rules of Court there must be some corroborating evidence to allow the confession introduced into evidence.

Tabor vs. U. S., 152 Fed. (2) 254.

In the case of *Tabor vs. U. S.*, supra, the Court said:

“It may be said that the rule in this country, in all Federal Courts which have considered the question has universally held that an extra jurisdictional confession will not be admitted unless corroborated by other evidence, the cases differ widely as to the extent of such evidence required and rules on this point have been variously stated. In most cases, it has been required that the evidence concerns the corpus delicti and some cases require that it touches every element thereof, but the diversity of these cases does not lend itself to the statement of any general rule. Only a few cases have allowed such confessions to be admitted where the extraneous proof did not definitely touch the corpus delicti and these cases may be considered somewhat ambiguous under their special facts.

There was no corroborated evidence in the present case that would justify the admission of the confession under any of the rules laid down by the various courts and the trial judge should have granted the motion for a directed verdict on the indictment. * * *

From a careful review of the testimony adduced in this case it shows conclusively that the entire governments evidence as to the matters of overstated depreciation was predicated upon the Government's Agent, Lloyd Tucker, relating alleged confessions, admission and conversations with the appellant and no other evidence was adduced before the jury, by the Government in support of the allegations of the indictment as to the matters of depreciation as set forth in the Government's Bill of Particulars.

V.

A. The District Court erred in refusing to grant appellant's motion of acquittal at the end of the Government's case, and at the end of all the evidence adduced before the jury, upon the ground that the evidence was insufficient to sustain a conviction;

B. The District Court erred in refusing to grant appellant's motion for judgment of acquittal notwithstanding the verdict, upon the ground and for the reason that the evidence was insufficient to sustain the verdict.

C. The District Court erred in refusing to grant appellant's motion for a new trial upon the ground and for the reason that the evidence was insufficient to sustain a conviction.

(In order to save space the following statement pertains to the Assignments of Error Nos. V, VI and VII, and designated above as A, B, and C.)

The evidence is not sufficient to support the verdict and judgment of guilty of violation of Title 26, U.S.C. 145(b) (attempt to defeat and evade income tax) in the sum of \$1,058.03, as charged in the indictment herein and as limited to depreciation overstated and contained in Government's Bill of Particulars.

A careful examination of the Transcript will reveal no evidence whatsoever, or any competent testimony or other evidence of any income whatsoever received by the appellant for the year 1947 as alleged in the indictment herein.

The Government relied solely upon statements of the appellant as to depreciation taken on the property in question, to-wit: the property known as Henshaw Road property, and as set forth in Government's Bill of Particulars. The Government in the prior trial attempted to prove by financial statements the income of the appellant but at this trial the Government only put in the statements, admissions or confessions of the appellant thus putting nothing in evidence before the Court and jury except the statements of the appellant herein, uncorroborated in any manner whatsoever, and which is insufficient to sustain a conviction.

A universal and existing rule is that one may not be convicted of a crime upon his uncorroborated extra judicial confession.

Forte vs. U. S., 127 A.L.R. 1120, and annotations thereunder.

To sustain a conviction there must be *some* evidence of corpus delicti independent of alleged extra judicial confessions and admissions of the defendant.

The rule in this country in all Federal Courts which have considered the question, is that all extra judicial confessions

or admissions will not be admitted in evidence unless corroborated by other evidence.

Davena vs. U. S., 198 Fed. (2) 230;

Tabor vs. U. S., 152 Fed. (2) 254;

U. S. vs. Yost, 157 Fed. (2) 147;

Pines vs. U. S., 123 Fed. (2) 825;

Gordnier vs. U. S., 261 F. 910.

In the case of *U. S. vs. Chapman*, Seventh Circuit, 168 Fed. (2) 997, page 1001, in the latter case we said:

“Appellant contends that ‘in a “net worth case” the starting point must be based upon a solid foundation and a Revenue Agents’ statement of defendant’s oral statement or confession when uncorroborated is not sufficient to convict. We fully agree with his statement of the law.’ In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extra-judicial admission by defendant that defendant evaded some income tax.

Gleckman vs. U. S. (8th Circuit) 80 Fed. (2) 394, 399;

U. S. vs. Miro, (2nd Circuit) 60 Fed. (2) 58, 61;

U. S. vs. Fenwick, 177 Fed. (2) 448;

O’Brien vs. U. S., (7th Circuit) 51 Fed. (2) 193, 196.”

In *Tabor vs. U. S.*, *supra*, the Court in that case laid down the rule:

“The necessity for independent corroboration of a confession of the character of the one here or as to the admissions made after the crime is clearly recognized by the Supreme Court of the U. S. in the case of *Warszower v. U. S.*, 312 U. S. 342, 61 S. Ct. 603, 85 L. Ed. 876”

Further sustaining the law as outlined heretofore, the Court in the case of *U. S. vs. Berman*, 75 Fed. Supp. 789 observed the following:

“In the prosecution for fraudulent evasion of income tax, the government was required to prove beyond a reasonable doubt items which it claimed were properly chargeable to income construed taxable income and that failure to return them was wilful.”

The Court further found that each case must rest upon the *actual facts* and that without competent evidence to sustain the verdict, a motion for judgment of acquittal should have been granted, and that the burden rested upon the Government to prove that items charged to the defendant were in fact taxable income and must be shown by competent evidence to be such.

In consideration of all the evidence presented to the trial court, as revealed by the Transcript and the law applicable thereto and presented herein, it therefore follows that appellants conviction cannot stand under the state of the evidence adduced and the law pertaining to the subject.

It must therefore be concluded there was no evidence upon which the jury could find the appellant guilty of an attempt to defeat and evade income tax as alleged in the indictment herein.

CONCLUSION

It is respectfully submitted in view of the foregoing that this Honorable Court should reverse the judgment of the District Court and order appellant's motion of acquittal be granted, or in the alternative order that a new trial be granted.

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Phoenix, Arizona

In propria persona



No. 14,409

IN THE

United States
Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona.

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IN THE

United States
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Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona.

REPLY TO APPELLEE'S PLEADINGS

The appellant disagrees with the appellee in that the plea in bar covered both double jeopardy and res judicata but points out to the Court that the appellant's plea in bar was upon double jeopardy only (TR 6 thru 11). This is shown further by the fact that the appellee's motion of plaintiff for rehearing of defendant's plea in bar has designated thereon "double jeopardy". This is in answer to paragraph 2 of appellee's "pleadings" on page 3 of appellee's brief.

In further reply to appellee's pleading, paragraph 2 on page 4 of appellee's brief, the appellant disagrees with

appellee that said pleas are "in reality directed to paragraphs designated (a) and (b)"; but the appellant urges that the pleas are not limited to (a) and (b) but are to (a) and (b) and the third matter of depreciation and are in fact directed to the whole of the indictment.

In reply to the third paragraph on page four of appellee's brief the appellant calls the court's attention to the fact that the appellee has mis-quoted the record in that he stated in paragraph 3, page 4 of appellee's brief "that the question of 'res judicata,' but not the question of double jeopardy." The appellant calls the court's attention that the plea in bar as to double jeopardy was filed in the trial court on January 15th, 1954, that the court on the 25th day of February, 1954, granted the plea in bar and denied it in part. That on the 12th day of March, 1954, the United States attorney, for and in behalf of appellee, filed a motion of plaintiff for rehearing of defendant's plea in bar (double jeopardy); that the motion of plaintiff for rehearing on defendant's plea in bar (double jeopardy) was granted by order of the court on the 22nd day of March, 1954 (TR 28-29). That thereafter, on the 29th day of March, 1954, the appellant filed his motion to dismiss (or quash) indictment (plea of res judicata). Therefore the matter of res judicata was not brought to the United States Attorney's attention or to the trial court's attention prior to March 29, 1954 and the United States Attorney could not have understood that the plea in bar was upon the ground of res judicata, on the 25th day of February, 1954 (TR 18-19), for it was not brought to his attention for the period of one month, thereafter.

The appellant in reply to paragraph 1 on page 5 of appellant's brief denies that the "applicability of the doctrine of res judicata is, we submit, the principal question raised on this appeal." We respectfully submit that we would like to

have this Court consider all of the specifications of error and not limit its consideration to one specification of error as set out by the appellee.

In reply to paragraph 1 under the "issues" on page 5 of appellee's brief the appellant disagrees with appellee that only three questions are raised in this appeal but urge that, first, double jeopardy; second, res judicata; third, lack of jurisdiction to re-indict; fourth, extra judicial confession will not be admitted unless corroborated by other evidence, and fifth, the evidence is not sufficient to support the verdict and judgment of guilty and the appellant would not like to be limited to only three questions before this court as set out by the appellee.

The appellant, in reply to paragraph 1 of appellee's "Statement of Facts" on page 7 of appellee's brief, denies that the only issues involved in this appeal "are principally legal and not factual" but the appellant urges that the questions before this Court on this appeal are both legal and factual.

The appellant in reply to paragraph 3 of the appellee's "Statement of Facts" on page 8 of appellee's brief, calls the Court's attention to the testimony of Charles E. Dyer and Charles A. Mathis in that the Transcript of Record of their testimony shows that they were only employees of the appellant and did not completely finish any contract for the appellant (TR 150-169).

The appellant in reply to appellee's "Statement of Facts" paragraph 1 on page 9, is to the effect that the statement therein "the \$5500.00 item is the improved 'COLLINS PROPERTY'" is the OPINION of the counsel for appellee and the Transcript of Record does not so show.

Appellant in answer to paragraph 2 of appellee's "Statement of Facts," page 9 of appellee's brief, denies that "Mr.

C. L. Howard's testimony ESTABLISHES that both \$20,000.00 items refer to the 'Henshaw Road property' but in fact the testimony of C. L. Howard does not at any time or anywhere mention the "Henshaw Road property" (TR 128-132).

The appellant in reply to appellee's "Statements of Facts," paragraph 5 on page 9 of appellee's brief, denies that the testimony of Mr. Sruckmeyer had anything to do whatsoever with the tax return of 1947, the matter at bar, for the reason that his testimony shows said conversations took place during the years 1943 to 1946.

REPLY TO APPELLEE'S PROPOSITIONS OF LAW

The indictment in the present case may be divided into three specific categoric items (a) and (b) were previously contained in the indictment found against the appellant in Criminal Cause C-9558, Phx, which was reviewed by this court in the case of *Spriggs v. United States*, 198 Fed. (2) 782. This court in its opinion states that the appellant was acquitted upon portions of Count III; these portions of Count III are items (a) and (b), involved in the present indictment. It was within the power of the trial court under the provisions of Rule 29 of the Federal Rules of Criminal Procedure to direct a judgment of acquittal be entered. This court, in its opinion, has accepted the propositions, the entry of judgment of acquittal of these items was, and constituted an acquittal of the appellant. The appellee did not complain of the ruling and this ruling has become final.

Wilson v. United States, 166 Fed. (2) 527.

The third element in the indictment of this case consists of depreciation overstated as appears in the Transcript of Record. This is the same element as that considered by this court in its former decision. The Court, by its decision,

found there was insufficient evidence to sustain the verdict of conviction as to this element and the judgment of conviction was reversed, thereafter on October 15th, 1952, the United States District Court, District of Arizona, in Cause No. C-9558, in conformity with the mandate of the Court of Appeals entered an order dismissing the former indictment en toto. This dismissal was consistent with Rules 29 and 48 of the Federal Rules of Criminal Procedure. This court, in *Korn v. United States*, 158 Fed. (2) 568 (Ninth Circuit) held that the proper procedure on the reversal of the case for insufficient evidence was that it would be reversed and a judgment of acquittal entered upon such reversal. As the court pointed out in the *Korn* case such action could be taken under Rule 29. The action could further be sustained under the provisions of Rule 48 which provides "that the United States Attorney by leave of Court may file a dismissal of indictment, information or complaint and further that such dismissal shall effect a termination of prosecution."

In construing this rule the District Court (Conn) in *United States v. Doe*, 101 Fed. Supp. 609, held such action could be taken only upon a showing that the government lacks evidence to warrant prosecution.

The Court in the case of *United States v. Northwest Telegraph Company*, 52 Fed. Supp. 973, held "upon reversal by the appellate court the trial court, though receiving the case for the retrial is bound by all its rules 'as the law of the case'". *Seagraves v. Wallace*, 69 Fed. (2) 163; *Peavy-Byrnes Lumber Co. v. Com'r*, 86 Fed. (2) 234.

It makes little difference whether or not this order of dismissal is called a dismissal or a judgment of acquittal. In either event it has the effect of an acquittal and therefore, all three sections (a), (b), and the depreciation overstated,

the whole of the Bill of Particulars is barred by the doctrine of former jeopardy.

The court by its order reinstating the indictment en toto after he had entered an order granting the plea in bar in part was in fact an assumption by the court of the duties of the Grand Jury since the Grand Jury is the only body or person that may indict a person after dismissal. The granting of the plea in bar in part constituted the dismissal of that portion of the indictment and under the case of *Ex Parte Bain*, 121 U.S. 1, and the voluminous cases thereunder, holds that only the Grand Jury may file an indictment against a defendant.

The appellee has from page 15 to page 29 of his brief, argued the matter of res judicata, same being in the line of argument that res judicata does not apply to criminal matters or as he states, should not apply to criminal matters. It is contrary to the weight of authority in that our Federal Courts have practically universally held and all the text books are in conformity therewith that the doctrine of res judicata does apply to criminal matters and to argue the point in this brief would be an insult to the intelligence of this Court.

In answer to appellee's argument of the sufficiency of the evidence, the appellant points out to the court that only one witness, Lloyd Tucker, agent for the Internal Revenue Department, is the only witness testifying as to depreciation of the Henshaw Road property and this court has already held in the opinion case, that this evidence is insufficient since it is based only upon the admissions, statements or confession of the appellant and no other evidence having been produced the extra judicial confession should not be admitted unless corroborated by other evidence, and since no other evidence was produced in this trial the evidence is insufficient to convict.

REPLY TO APPELLEE'S CONCLUSIONS

Since the doctrine of former jeopardy together with the doctrine of res judicata applies to the whole of the indictment and the insufficiency of the evidence is to the whole of the indictment the appellant's motion for judgment of acquittal to the indictment herein should be granted and the lower court instructed to enter a judgment of acquittal, or in the alternate that a new trial be granted.

Respectfully submitted

CLAUDE E. SPRIGGS

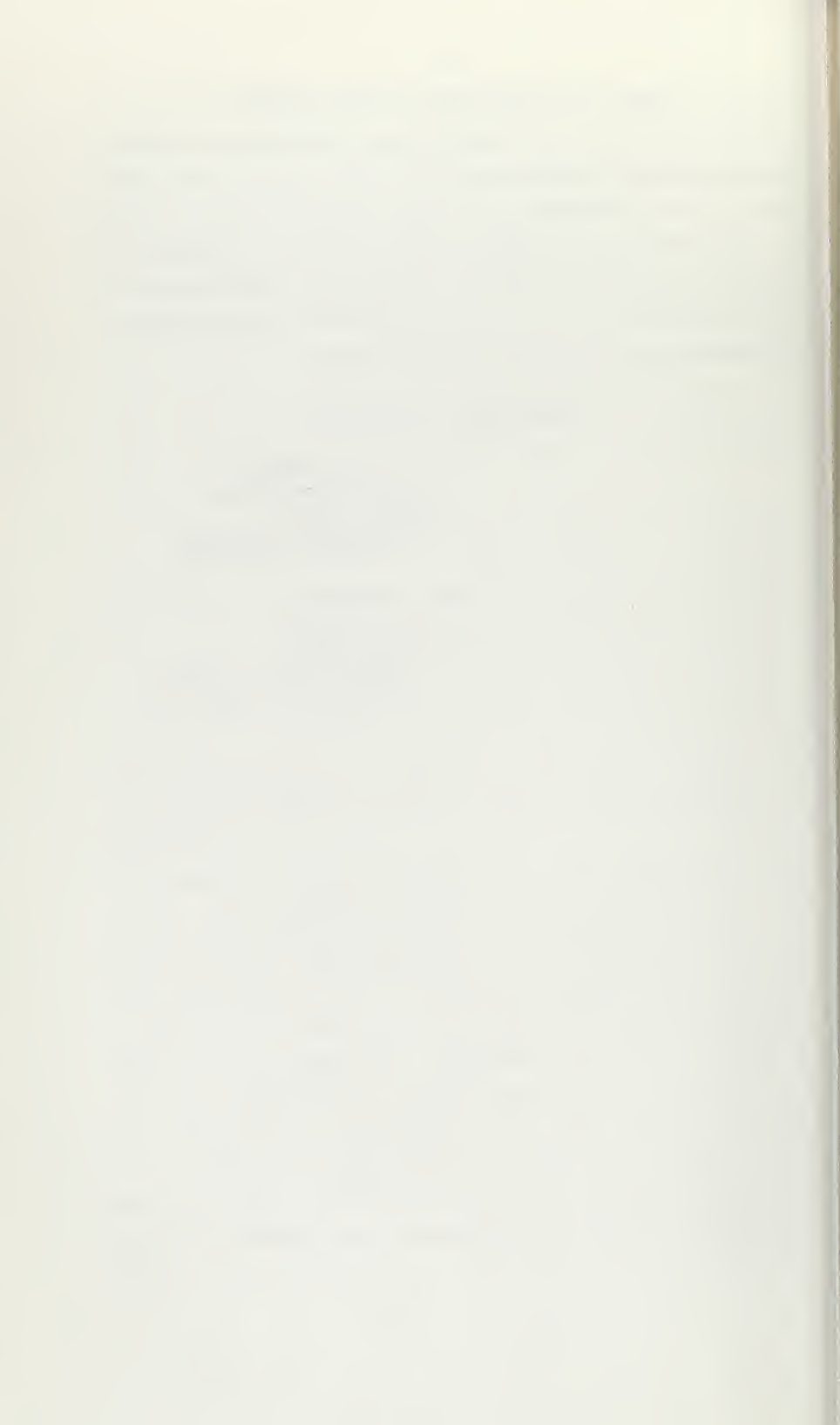
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(Criminal Action)

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For the Ninth Circuit

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Petition for Rehearing

Appeal from the United States District Court
for the District of Arizona.

*To: The Honorable United States Court of Appeals for the
Ninth Circuit:*

The petition of the defendant-appellant for a rehearing of the appeal herein is based upon the following grounds:

1. The Court erroneously concluded that the dismissal of the prior indictment was not accomplished under Rule 48, Federal Rules of Criminal Procedure.
2. The Court erroneously assumed that a written order granting appellee's plea in bar in part was signed by the trial judge through inadvertence.

3. The Court erroneously concluded that the action of the trial Court upon the trial of the first indictment in striking items (a) and (b) of Count III did not constitute an acquittal as to these items.

4. The Court misapplied the rules and principles announced by this court in *Spriggs v. United States*, 198 Fed. (2) 782.

5. The Court disregarded the rule announced by this Court in *Karn v. United States*, 158 Fed. (2) 568, and Rule 29, Federal Rules of Criminal Procedure.

6. The Court disregarded the rule of res adjudicata.

ARGUMENT

Point I

Rule 48 of the Rules of Criminal Procedure provides that the Attorney General or the United States Attorney may file a dismissal of indictment, information or complaint only by leave of court. The rule further provides upon such dismissal being entered "the prosecution shall thereupon terminate."

This court, in its opinion, has stated that the dismissal of the first indictment which was entered following receipt of the mandate of the Court of Appeals in *Spriggs v. United States*, 198 Fed. (2) 782, was entered as a common law nolle prosequi. The effect of the adoption of Rule 48 was to abolish the common law nolle prosequi. This action could not therefore have constituted a nolle prosequi. Notes of Advisory Committee on Rule 18, U.S.C.A., Rule 48, page 537, *United States v. Doe*, 101 Fed. Supp. 609, American Law Institute Code of Criminal Procedure page 895-897. The fact that appellant Stipulated to such dismissal does not in any way bar him from relying upon the dismissal as a termination of the prosecution. The appellant could only

have stipulated to a dismissal under Rule 48 with all of the attendant effects of such dismissal and certainly did not by such stipulation either expressly or tacitly authorize a re-indictment by another grand jury.

Point II

The trial court, Honorable Claude McCulloch, on February 10, 1954, at the time of denying the plea in bar stated from the bench that he wanted the United States Attorney to understand that notwithstanding his order denying the plea in bar he would not permit the United States Attorney to present evidence to the jury upon the trial of the matter with reference to items (a) and (b) of the Count which were duplications of the same items of Count III of the first indictment but would let him go to trial only upon item (c) which was the over-statement of depreciation on the Henshaw Road property. No reporter was present when these remarks were made by the trial court and for this reason they are not now a part of the record before this court. The affidavit of the appellant concerning this is filed herewith and by reference made a part of this petition. That pursuant to these statements of the Honorable Claude McCulloch, made from the bench on February 10, 1954, the United States prepared and presented the order of February 25, 1954. The order as prepared by the United States Attorney expressed the spirit of the remarks made by the trial judge from the bench on February 10, 1954.

Upon the plea in bar being granted in part and denied in part the Court lost jurisdiction of items (a) and (b) of the bill of particulars and jurisdiction could only be regained by a re-indictment of the Grand Jury. 5th Amendment of the United States Constitution; *ex-Parte Bain* 121, U.S. 1.

The Court in the case of *ex-Parte Bain* stated: "The

declaration of Article V of the Amendment of the Constitution, that no person shall be held to answer—unless on a presentment or indictment of the Grand Jury is *jurisdictional*.”

Point III and Point IV

It is a well established rule of law upon the empaneling of a jury and the taking of any testimony jeopardy attaches and may thereafter be claimed by the defendant; *Hunter v. Wade*, 169 Fed. (2) 973; 335 U.S. 907; *Clawans v. Rives*, 104 Fed. (2) 240; *McCarthy v. Zerbst*, 85 Fed. (2) 640.

The trial judge upon the first trial of the appellant withdrew from consideration of the jury items (a) and (b) of the bill of particulars as to Count III. This procedure has been approved in *Mellor v. United States*, 160 Fed. (2) 757, and *Ballard v. United States*, 152 Fed. (2) 941, 329 United States 187. The pertinent question presented to this court is the effect of such withdrawal. A careful examination of the authorities has been made and appellant has found two cases which hold that withdrawal of items from a jury on the grounds of insufficient evidence constitutes an acquittal of the defendant as to such items and amounts to a direction to the jury of judgment of acquittal. *State v. Lane*, 72 S.E. (2d) 737; *Parish v. State*, 165 S.W. (2d) 748.

The appellant has found no cases announcing a contrary rule.

This court in the first Spriggs appeal stated that the appellant had been acquitted of portions of Count III. We can see no justification of the court now concluding that this court did not mean exactly what it said in the first appeal but in fact this court in the first appeal held that the withholding items (a) and (b) from the jury constituted an acquittal.

Point V

The appellant, as pointed out in the opinion in this case, following his conviction in the first case, filed motions for judgment notwithstanding the verdict and for a new trial. Each of these motions were denied and the first appeal followed. It is appellant's contention that he was entitled to a judgment of acquittal notwithstanding the verdict. This is true even though a new trial was requested, for the reason the evidence was insufficient to support a conviction.

This court, in *Karns v. United States*, 158 Fed. (2) 569, held that the proper procedure on reversal of a case for insufficient evidence was that upon reversal a judgment of acquittal should be entered. It is our position that upon receipt of the mandate from the court in the first appeal, the entry of the order of dismissal by the trial court constituted such an acquittal. This procedure is consistent with the rule announced in the *Karns* case and Rules 29 and 48 of the Rules of Federal Criminal Procedure.

Point VI

The Court in its opinion totally disregarded the rule of res adjudicata although it is a well established rule in criminal procedure. The doctrine and application of res adjudicata and the distinction between double jeopardy and res adjudicata are discussed in an opinion of Justice Douglas in *Sealfon v. United States*, 332 U.S. 575. Also see 147 A.L.R. 992.

In the case of *Partmar Corporation v. Paramount Pictures Theatres Corporation*, 98 L.Ed. 301, wherein Justice Reed, speaking for the United States Supreme Court, affirmed the rule that a prior adjudication conclusively disposes of all matters which were or might have been litigated or adjudged therein.

The courts have held that the rule of res adjudicata applies to every question falling within the purview of the original action in respect to matters of both claim and defense which could have been presented by the exercise of due diligence and the conclusiveness of the judgment in such case extends not only to matters not determined but to other matters which could have been determined in the prior action.

30 Amer. Jur. 923, under judgments, para. 179;
 13 Amer. Jur. 45, under criminal law, para. 367;
United States v. Dockery, 49 Fed. Supp. 907;
United States v. Carlisi, 32 Fed. Supp. 479;
United States v. Oppenheimer, 242 U.S. 85;
Stone v. U. S., 167 U.S. 178;
 30 Amer. Jur. 907, under judgments, para. 161-165;
 167 A.L.R. 991;
United States v. Adams, 281 U.S. 202;
Fall v. United States, 49 Fed. (2) 506.

For the above reasons the defendant-appellant respectfully prays that this court grant a rehearing.

Dated May 6, 1955.

Respectfully submitted,

CLAUDE E. SPRIGGS
In propria persona

JACK C. CAVNESS
 510 Luhrs Tower
 Phoenix, Arizona

Attorney for Appellant

CERTIFICATE OF COUNSEL

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

CLAUDE E. SPRIGGS

In propria persona

JACK C. CAVNESS

510 Luhrs Tower

Phoenix, Arizona

Attorney for Appellant

Appendix Follows





APPENDIX

*In the United States Court of Appeals
For the Ninth Circuit*

No. 14,409

Claude E. Spriggs,

Appellant,

vs.

United States of America,

Appellee.

AFFIDAVIT

State of Arizona

County of Maricopa—ss.

CLAUDE E. SPRIGGS, being first duly sworn upon his oath deposes and says:

That he was in the Courtroom acting as his own attorney on the 10th day of February, 1954, in the above entitled matter; that on said date a hearing was held in front of the Honorable Claude McCulloch, United States District Judge, wherein hearing was had upon a motion filed by the defendant for a plea in bar. That at that time the Court announced from the bench, directed directly to Robert S. Murlless, Assistant United States Attorney, that the reason he was denying the plea in bar was with the express understanding that no evidence would be introduced upon items (a) or (b) of the bill of particulars of Count III of the indictment.

The Court further stated that he wanted the assistant United States Attorney to understand that upon the trial of the matter that he would be limited to the trial on item

(c) of the bill of particulars on Count III, which was for the over-statement of depreciation on the Henshaw Road property, for the reason that the trial court in the previous case had limited the United States Attorney to the trial of item (c), and that he was not going to reverse the prior trial court's ruling and further that the appellate court had affirmed the prior trial court's ruling.

CLAUDE E. SPRIGGS

Subscribed and sworn to before me this 6th day of May, 1955.

My commission will expire July 17, 1957.

GLADYSE L. ARMSTRONG
Notary Public

SEAL

No. 14412

**In the United States Court of Appeals
for the Ninth Circuit**

A B C BREWING CORPORATION (FORMERLY AZTEC
BREWING COMPANY), A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

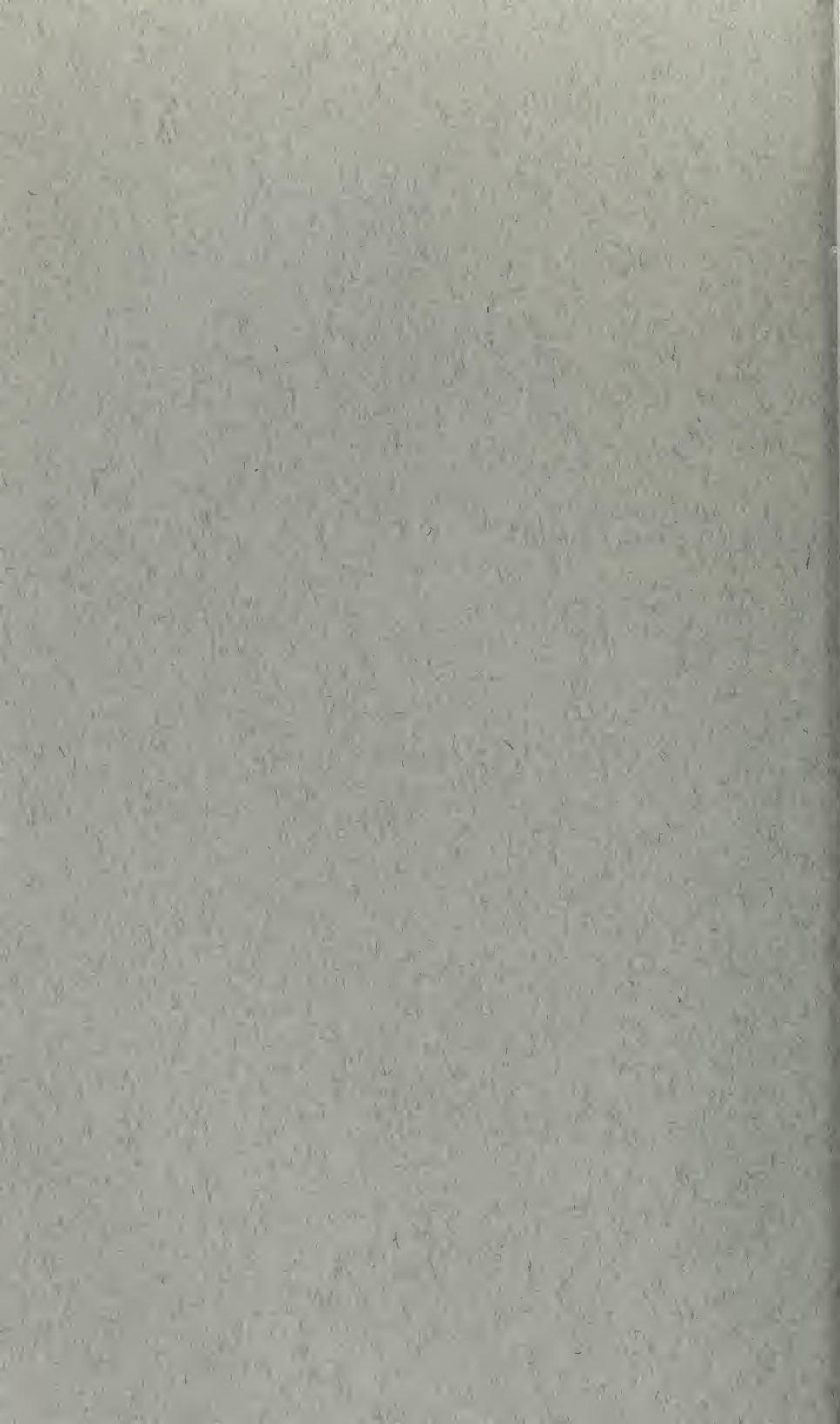
H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
CAROLYN R. JUST,
*Special Assistants to the
Attorney General.*

FILED

JAN 29 1955

**PAUL P. O'BRIEN,
CLERK**



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14412

A B C BREWING CORPORATION (FORMERLY AZTEC
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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 70-77) are reported in 20 T. C. 515.

JURISDICTION

Taxpayer's petition for review (R. 105-113) involves deficiencies in federal excess profits taxes for the fiscal years ended October 31, 1943, and October 31, 1944, resulting from the denial of its claims for a carry back of alleged unused excess profits credit from the years ended October 31, 1945, and October 31, 1946, respectively. Taxpayer filed corporation income tax and excess profits tax returns for the fiscal years 1943, 1944,

1945, and 1946 with the Collector of Internal Revenue for the Sixth District of California. (R. 9, 30.) On September 18, 1944, and April 26, 1946, the Commissioner of Internal Revenue mailed notices of deficiencies to the taxpayer advising it of a deficiency in excess profits taxes of \$232,437.25 for the fiscal year 1943, and of \$41,557.63 for the fiscal year 1944.¹ (R. 16-21, 35-43.) Within 90 days thereafter, on December 11, 1944, and July 17, 1946, taxpayer filed petitions for redetermination of the deficiencies under Section 275 of the Internal Revenue Code. (R. 9-21, 30-43.) On March 16, 1954, the Tax Court entered its decisions finding deficiencies in excess profits taxes for the fiscal years 1943 and 1944 in the amounts of \$217,423.07 and \$36,738.21, respectively.² (R. 77-78.) The case is brought to this Court by a petition for review filed by the taxpayer on June 14, 1954. (R. 105-113.) The jurisdiction of this Court is invoked under the provisions of Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED 3

Where all the stockholders consented to the dissolution of the taxpayer corporation on March 31, 1944, and on April 1, 1944, there was a partial liquidation through the distribution of all of taxpayer's assets except small amounts of cash and United States Treasury obligations, and, although taxpayer has not actively engaged in the brewery business since that date, its entire

¹ A portion of the deficiencies for both taxable years as determined by the Commissioner and by the Tax Court result from issues other than that involved in this appeal.

² See footnote 1, *supra*.

³ In the Tax Court, other issues were presented as to which neither the taxpayer nor the Commissioner has appealed.

activity being incident to winding up its affairs, no certificate of dissolution has ever been filed with the California Secretary of State, did the Tax Court err in finding that taxpayer was *de facto* dissolved as of November 1, 1944, and consequently is not entitled to a carry back of alleged unused excess profits credit from the fiscal years 1945 or 1946?

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Treasury Regulations are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts as stipulated by the parties (R. 46-48), as found by the Tax Court (R. 70-77), and as reflected in the testimony, pleadings, and exhibits may be summarized as follows:

Taxpayer was organized under the laws of the State of California in 1932, as the Aztec Brewing Company. Its principal place of business was in San Diego, California, where it operated a brewery from June, 1933, to March 31, 1944. It has not actively engaged in the brewery business since March 31, 1944. On March 7, 1944, all of taxpayer's stockholders executed a written consent stating their election to wind up and dissolve the corporation. On April 1, 1944, taxpayer distributed ⁴ assets of the corporation in partial liquidation, worth \$750,000 in book value. (R. 48, 71-72.)

⁴ The president of the taxpayer corporation testified that this distribution was to a partnership. (R. 79.) There is nothing further in the record as to this partnership. However, the relationship of the taxpayer corporation to the partnership was described by

During the fiscal years 1945 and 1946, taxpayer's stockholders set aside a good part of the basement for the corporation's voluminous records. (R. 88.) There was a bank account in taxpayer's name during these years, and its president and auditor performed various services on its behalf, such as the preparation and filing of federal and state returns, petitions to the Tax Court, applications for relief under Section 722 of the Code, and taking care of other matters relating to the winding up of taxpayer's affairs. Taxpayer's officers received no compensation and no salaries or wages were paid in these fiscal years. Small collections were made on accounts previously charged off by the taxpayer, and minor expenses were incurred. (R. 73, Exs. M and N.)

the California Supreme Court in *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 203 P. 2d 522, as follows (p. 521):

There is no conflict in the evidence on this question. The Aztec Brewing Company, a corporation, was organized in 1932 and thereafter engaged in the manufacture and sale of ABC beer. In March, 1944, the company's structure was changed to a partnership for tax reasons. All of the corporation's property was transferred to the partnership and the business continued as before, the partnership assuming without interruption the manufacturing, bottling and selling of ABC beer. The partners were the same persons as the stockholders in the corporation. They acquired and retained the same proportional interest in the partnership as they had in the corporate stock. The president and vice-president of the corporation became general partners in the new partnership while the other former stockholders became limited partners. The name, Aztec Brewing Company, was retained and a license procured to sell beer under that name. The partnership continued to employ the same personnel and use the same manufacturing plant and offices. No changes were made in labels, packing cases, letterheads or invoices. The corporation was not dissolved, however, but remained in existence to collect debts owed it, continuing for a short time to use the offices of its successor. Checks of the corporation and partnership were differentiated by the addition of the words "corporation" or "a partnership" after the name, Aztec Brewing Company.

Taxpayer's balance sheet as of March 31, 1944, showed the following assets and liabilities (R. 64-65):

March 31, 1944			
Assets			
Current assets			
Cash on hand.....	\$	11,476.72	
Bank of America.....		554,791.02	\$ 566,267.74
<hr/>			
Accounts Receivable—Customers.....			171,136.19
Inventories at cost (finished stock and containers, beer in storage, raw materials, supplies).....			363,411.05
<hr/>			
Total Current Assets.....			1,100,814.98
Property plant and equipment			
Plant and equipment.....		927,876.15	
Less Reserve for depreciation.....		541,415.73	386,460.42
<hr/>			
Land.....			8,501.29
Other assets.....			7,794.34
Deferred expenses (taxes, insurance, general expense).....			33,733.86
Intangible assets			
Organization expense.....		622.95	
Trade marks.....		2,353.83	3,016.78
<hr/>			
Total Assets.....			1,540,321.67
Liabilities			
Current liabilities			
Notes payable to vendors.....		18,937.14	
Accounts payable.....		29,730.50	48,667.64
<hr/>			
Accrued liabilities			
Salaries and wages.....		7,617.43	
Social security and unemploy. taxes.....		14,108.41	
Other taxes.....		357,453.77	379,179.61
<hr/>			
Total Current Liabilities.....			427,847.25
Other liabilities			
Credit balances in former customers' accounts.....		240.85	
Unrealized profit on excess profits tax bonds (per Contra).....		1,696.32	1,937.17
<hr/>			
Capital stock.....		100,000.00	
Surplus.....	\$584,591.42		
Current year profits.....	425,945.83	1,010,537.25	
<hr/>			
Total Capital.....			1,110,537.25
<hr/>			
Total Liabilities.....			\$1,540,321.67

Taxpayer's balance sheets at the end of the fiscal years 1944, 1945 and 1946 reflect the following assets and liabilities (R. 66) :

Assets	October 31		
	1944	1945	1946
Cash.....	\$107,158.61	\$ 1,498.11	\$ 15,299.58
U. S. Treasury Obligations.....	143,172.23	13,172.23	10,000.00
Total Assets.....	<u>\$250,330.84</u>	<u>\$ 14,670.34</u>	<u>\$ 25,299.58</u>
Liabilities			
Accrued taxes.....	\$ 13,050.36		\$ 72.13
Accrued Expenses.....		\$ 25.35	21.25
Unrealized Profit on Excess Profits Tax Bonds.....	3,172.23	3,172.23	
Capital Stock.....	\$100,000.00	\$100,000.00	\$100,000.00
Earned Surplus.....	884,108.25	661,472.76	675,206.20
Sub-total.....	<u>\$984,108.25</u>	<u>\$761,472.76</u>	<u>\$775,206.20</u>
Less: Liquidation Account.....	750,000.00	750,000.00	750,000.00
Net Worth.....	<u>\$234,108.25</u>	<u>\$ 11,472.76</u>	<u>\$ 25,206.20</u>
Total Liabilities.....	<u>\$250,330.84</u>	<u>\$ 14,670.34</u>	<u>\$ 25,299.58</u>

The increase in net worth over the period October 31, 1945, to October 31, 1946, of \$13,733.44, as shown above, was derived as follows (R. 72) :

Recoveries on bad debts.....	\$ 150.00
Refund of California franchise tax.....	204.12
Postwar refunds of excess profits tax.....	13,472.70
Total additions.....	<u>\$13,826.82</u>
California franchise tax.....	\$ 21.25
Federal income tax.....	72.13
Total reductions.....	<u>\$ 93.38</u>
Net increase.....	<u>\$13,733.44</u>

Taxpayer's returns for the fiscal years 1944, 1945 and 1946 showed the following items of gross income and deductions (R. 73, Ex. L):

	Fiscal Year Ended October 31		
	1944	1945	1946
Gross profit from sales.....	\$599,072.96	0	0
Interest on loans, notes, mortgages, bonds, bank deposits, etc.....	339.64	0	0
Interest on U. S. Obligations.....	960.00	\$ 582.00	0
Recoveries on bad debts.....	25,073.07	256.00	\$ 150.00
Other income (refunds, discounts, & misc.).....	5,783.33	0	0
Refund of California franchise tax...	0	0	204.12
Gain from sale or exchange of capital assets.....	81.30	0	0
Total income.....	\$631,310.30	\$ 838.00	\$ 354.12
Deductions:			
Capital stock tax.....	\$.....	\$ 62.50	\$ 0
California franchise tax.....		12,621.34	21.25
Collection fee on debt recoveries...		30.00
Total deductions.....	\$329,306.66	\$12,713.84	\$ 21.25
Net income (or loss).....	\$302,003.64	(\$11,874.84)	\$ 332.87

Taxpayer's auditor received a letter from its attorney dated January 4, 1946, reading in part as follows (R. 74):

It is also believed advisable to file a corporation excess profits tax return for the year ended October 31, 1945, even though no tax is due for that year in order to show a basis for claiming the benefits of an unused excess profits credit carryback. That return has been prepared and is enclosed herewith in triplicate.

No certificate of dissolution has yet been filed on taxpayer's behalf with the Secretary of State pursuant to Section 5200, California Corporation Code.

On September 21, 1946, taxpayer's name was changed to the A B C Brewing Corporation. (R. 72.)

The Tax Court found that on the facts taxpayer had been *de facto* dissolved at the beginning of the fiscal

year 1945, and consequently it held that taxpayer was not entitled to a carry back of alleged unused excess profits credit from that year to the fiscal year 1943 or from the fiscal year 1946 to 1944. (R. 74-77.) From that holding the taxpayer has appealed to this Court. (R. 77-78, 105-112.)

SUMMARY OF ARGUMENT

The Tax Court did not err in disallowing the taxpayer's claim for a carry back of alleged unused excess profits credit from the fiscal year 1945 to the year 1943, and from the fiscal year 1946 to the year 1944. Section 710(c) of the Internal Revenue Code is a special relief provision that was designed to correct hardship cases by leveling the burden of excess profits taxes over a five-year period of operations. Congress had no intention to grant carry backs in situations unrelated to the purpose and intent of the statute.

While a corporation that has begun to liquidate is not excluded from the carry back provisions of the statute, a corporation that is in existence in name only, without corporate substance, and which serves no business purpose, must be treated as *de facto* dissolved and a carry back necessarily denied.

The record fully supports the Tax Court's finding that the taxpayer ceased all normal business activity on April 1, 1944. Thereafter it made no sales, had no inventory, owned no land, plant or equipment. It paid no salaries or wages and its assets were all distributed to the stockholders except for small amounts of cash and United States Treasury obligations. Excess profits tax returns were filed only as a basis for hypothetical excess profits credit carry backs.

There is no merit to taxpayer's argument that it nec-

essarily continued as a corporation to resolve tax disputes with the Internal Revenue Service and to file tax returns and prepare claims under Section 722 of the Code. All these activities could have been completed after formal dissolution. Under California law, a dissolved corporation continues in existence for the purpose of winding up and its directors have full authority to defend or prosecute actions. The Tax Court was more than fair in allowing a carry back for a seven months' period after the date on which the taxpayer ceased to operate as a brewery. The taxpayer has shown no valid reason for prolonging the existence of the corporation and no reason for it except tax avoidance. To permit a taxpayer to continue to carry back a large excess profits credit simply by retaining its charter and doing nothing is contrary to the purpose of Congress in enacting the carry back provisions.

The taxpayer has failed to carry the burden of showing its right to the claimed deduction. In the absence of a showing that the Tax Court was clearly erroneous in its finding that the taxpayer had *de facto* dissolved, on which its denial of a carry back depends, its decision should be affirmed.

ARGUMENT

A Corporation Which Has Been *De Facto* Dissolved Is Not Entitled to Carry Back Excess Profits Credit Simply by Retaining Its Corporate Form While Engaging in No Activity *A. In General.*

The excess profits tax statutes, which were applicable through 1945 but repealed for subsequent years,⁵ im-

⁵ However, by Section 122(b) of the Revenue Act of 1945, c. 453, 59 stat. 556 (Appendix, *infra*), a carry back, if otherwise allowable, is permitted from a taxable year beginning before January 1, 1946.

pose a tax of 95 percent on what is termed the "adjusted excess profits net income." Section 710(a) and (b) of the 1939 Internal Revenue Code (Appendix, *infra*). To determine the amount of "adjusted excess profits net income", the "excess profits net income" is determined by making certain adjustments to normal tax net income and from the resulting figure is deducted (1) a specific exemption; (2) an excess profits credit (designed to exclude what are normal, as distinguished from excess, profits of the taxable year); and (3) the amount of the excess profits credit adjustment for the taxable year, consisting of carry overs and carry backs of unused excess profits credits for certain prior and subsequent years. Sections 710(b) and (c) (Appendix, *infra*), and 711(a), as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974. We are not here directly concerned either with taxpayer's specific exemption or its excess profits credit for the taxable years. The sole question in this case deals with the taxpayer's right to the third deduction, that is, whether the Tax Court erred in disallowing the taxpayer's claim for a carry back of alleged unused excess profits credits from the fiscal year 1945 to the year 1943, and from the fiscal year 1946 to the year 1944.

Section 710(b)(3) requires that the amount of the unused excess profits credit adjustment for the taxable year be computed "in accordance with subsection (c)." Under subparagraph (1) of subsection (c) the unused excess profits credit adjustment for any taxable year consists of the aggregate of unused excess profits credit carry overs and carry backs to such taxable year.

The carry backs are authorized by subparagraph (3) (A) in the following language:

If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, * * *

B. Legislative History.

Section 710(c) of the 1939 Code is a special relief provision designed to give relief in hardship cases by leveling the burden of excess profits taxes over a period not to exceed five consecutive tax years of a going concern. The Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, added special relief provisions to the Excess Profits Act as originally enacted in 1940, allowing corporations to carry forward any unused excess profits credit into the two succeeding taxable years. In describing these special relief provisions and the carry forward, Congress said (S. Rep. No. 75, 77th Cong., 1st Sess., p. 2 (1941-1 Cum. Bull. 564, 565); H. Rep. No. 146, 77th Cong., 1st Sess., pp. 1-2 (1941-1 Cum. Bull. 550-551)):

Experience with excess-profits taxes, both in the United States and abroad, has demonstrated conclusively that relief in abnormal cases can not be predicated on specific instances foreseeable at any time. The unusual cases that are certain to arise are so diverse in character and unpredictable that relief provisions couched in other than general and flexible terms are certain to prove inadequate.

For these reasons, the present legislation at-

tempts to provide, both by specific terms and in carefully guarded general terms, a set of flexible rules which should alleviate at least the bulk of the *severe hardship cases* which may arise. * * *

* * * * *

The bill affords relief in the following situations:

1. It relieves the *hardships* which may be *caused by the sharply fluctuating earnings* of many types of companies, the activities of which are *dependent upon business cycles*, by allowing unused excess-profits credits to be carried over into the two succeeding taxable years, thereby *tending to level off the unusual effects due to rise and fall of income*. * * * [Italics supplied.]

The Revenue Act of 1942, c. 619, 56 Stat. 798, added amendments to permit corporations also to carry this unused credit back two years. The expressed purpose of Congress in enacting the carry back provisions here involved (Section 710(c)(3)(A)) was to afford relief to corporations faced with the difficulties attendant upon conversion to peacetime production. That the provisions were intended to be limited to corporations which were continuing their normal business activity is demonstrated by S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 51-52 (1942-2 Cum. Bull. 504, 547), which reads in part as follows:

Many corporations *will suffer substantially* in periods of declining profits, especially at the close of a war economy in which their deductible expenses have been held down to a bare minimum by priori-

ties, rationing, labor shortages, and other factors beyond the control of the taxpayer. * * *

* * * * *

To afford relief to these *hardship cases*, where maintenance and upkeep expenses, must, because of wartime restrictions be *deferred to peacetime years*, your committee has provided a 2-year carry-back of operating losses and of unused excess-profits credit. This provision affords, in effect, the same type of relief in periods of declining profits which the present 2-year carry-forward of operating losses and unused excess-profits credits affords in periods of increasing profits. [Italics supplied.]

It appears that the obvious purpose and intent of Congress in enacting provisions for the carry back of excess profits tax credit was to give relief to corporations faced with the difficulties attendant upon the projection of their normal business activities into the ensuing peacetime era and that Congress did not intend the excess profits tax credit carry back provisions to benefit a corporation which had ceased business and whose continued existence served no business purpose.

Congress recognized the dangers involved in the carry back provisions and sought to warn against the very situation involved in this case. Congress observed, in connection with the 1945 Revenue Act, c. 453, 59 Stat. 556, which repealed the excess profits tax but provided for carry backs of unused excess profits tax credits from 1946 in certain circumstances, that (S. Rep. No. 655, 79th Cong., 1st Sess., p. 30 (1945 Cum. Bull. 621, 645)) :

There is danger that the operation of the unused excess-profits credit carry-back provision, particu-

larly in 1946, may make possible certain *abuses*. These potential abuses might arise through various devices or transactions entered into wholly or in large part for the purpose of obtaining refunds of wartime excess-profits taxes through unused credit carry-backs, or through transactions having the apparent effect of creating carry-back refunds in *situations unrelated to the purpose and intent of the provisions allowing carry-backs*. While various *tax-avoidance schemes* are already dealt with either by express provision in the internal-revenue laws or *through court decisions*, your committee will give further consideration to the necessity or desirability of retroactive legislation in this connection. [Italics supplied.]

C. *The Tax Court correctly held that the taxpayer is not entitled to a carry back from the fiscal years 1945 and 1946 inasmuch as it had been de facto dissolved as of November 1, 1944.*

It is well established that whether or not a taxpayer corporation is entitled to relief under the carry back provisions of Section 710(c)(3) of the Code must depend upon whether the facts presented show that the conditions against which Congress sought to relieve actually obtained with respect to it. *Wier Long Leaf Lumber Co. v. Commissioner*, 173 F. 2d 549 (C.A. 5th); *Eastern Grain Elevator Corp. v. McGowan*, 95 F. Supp. 40 (W.D. N.Y.); *Justice Motor Corp. v. McGowan*, 97 F. Supp. 570 (W.D. N.Y.).

Taxpayer admits that if a corporation has legally been dissolved there would be no excess profits credit thereafter subject to a carry back. (Br. 13.) Taxpayer

argues that the language of Section 710(c) and of Treasury Regulations 112, Section 35.710-3 (Appendix, *infra*), does not exclude corporations in liquidation from the benefits of an unused excess profits credit carry-back. (Br. 8.) The Tax Court, however, made no holding and the Commissioner has never maintained that simply because a corporation has begun to liquidate it is no longer entitled to a carry back.

The principle that is involved here is one which has frequently been decided,—that a corporation that is in existence in name only without corporate substance and which serves no business purpose must be treated as *de facto* dissolved and a carry back denied. *Wier Long Leaf Lumber Co. v. Commissioner, supra*; *Aluminum Products Co. v. United States*, 101 F. Supp. 373 (C. Cls.); *Eastern Grain Elevator Corp. v. McGowan, supra*; *Wheeler Insulated Wire Co. v. Commissioner*, 22 T. C. 380; *Diamond A Cattle Co. v. Commissioner*, 21 T. C. 1; *Winter & Co. (Indiana) v. Commissioner*, 13 T. C. 108; *Gorman Lumber Sales Co. v. Commissioner*, 12 T. C. 1184; *Rite-Way Products, Inc. v. Commissioner*, 12 T. C. 475.

As stated in *Gregory v. Helvering*, 293 U. S. 465, 469, where the Supreme Court held the creation of a corporation was “simply an operation having no business or corporate purpose” under the circumstances of the case, “the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended”. It has been repeatedly held under various provisions of the revenue laws that a corporation remains a separate taxable entity only so long as it serves a business purpose. *Gregory v. Helvering, supra*; *Burnet v. Commonwealth Imp. Co.*, 287 U. S.

415; *Moline Properties v. Commissioner*, 319 U. S. 436. A thorough analysis of the proposition may be found in *National Investors Corp. v. Hoey*, 144 F. 2d 466 (C. A. 2d), where the Court of Appeals, after reviewing Supreme Court authorities, stated (p. 468):

to be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial, or other activity besides avoiding taxation: in other words, that the term "corporation" will be interpreted to mean a corporation which does some "business" in the ordinary meaning; and that escaping taxation is not "business" in the ordinary meaning.

The facts of the *National Investors Corp.* case are of interest here. In that case the corporate taxpayer had created a new corporation and had transferred to it all of the assets of the taxpayer's subsidiaries in return for stock in the new corporation. When the stockholders rejected the plan of unification in 1934, the taxpayer decided to liquidate the corporation, and commenced the liquidation on December 21, 1935. Liquidation was not completed until 1936. The court stated (p. 468):

However, although the stipulation declares that the "Plan" was submitted to the shareholders on December 20, 1934, and was rejected, it does not tell us when the rejection took place, or why the plaintiff waited for almost the whole year 1935 before liquidating the company. * * *

The reason upon this record why we cannot accept the value on that day is that, although the original acquisition of the shares was a part of a "business" activity, as well as their subsequent retention until

the "Plan" was rejected, as soon as that happened, *any continued retention of the securities longer than was necessary for liquidation, was not a "business" activity*, * * *. [Italics supplied.]

Nor is it of any significance that the Tax Court did not expressly find that taxpayer's motive in prolonging the liquidation was to avoid taxes. In *Commissioner v. National Carbide Corp.*, 167 F. 2d 304 (C. A. 2d), affirmed, 336 U. S. 442, the court stated (p. 306):

We think that the citation of *Gregory v. Helvering*, as authority for this, meant that the subsidiary was a "sham" when it was not created or used for some business purpose, * * *

* * * for it is not the presence of an accompanying motive to escape taxation that is ever decisive, but the absence of any motive which brings the corporation within the group of those enterprises which the word ordinarily includes.

See also *Gregory v. Helvering*, *supra*.

The record in this case makes clear that taxpayer did not continue its normal business activity during the fiscal years 1945 and 1946. Taxpayer does not deny that on March 7, 1944, all taxpayer's stockholders joined in a resolution consenting to the dissolution and that after April 1, 1944, taxpayer ceased to carry on a brewery business. The Tax Court allowed a carry back up to the end of October, 1944, but held that taxpayer had *de facto* dissolved on November 1, 1944. After that date and during the fiscal years 1945 and 1946, taxpayer had no sales and therefore received no profit from sales. It had no inventory. It likewise had no land, plant or

equipment. All had been taken over by the partnership when distribution in liquidation was made of nearly all the taxpayer's assets. (R. 79; see footnote 4, *supra*.) Taxpayer paid no salaries or wages after November 1, 1944. Its assets were reduced from \$1,540,321.67 on March 31, 1944, to \$14,670.34 at the end of the fiscal year 1945. After November 1, 1944, it had no accounts receivable. Its only income was derived from interest on United States Treasury obligations, recoveries on bad debts, and a refund of California franchise tax. The letter addressed to taxpayer's auditor from its attorney dated January 4, 1946, makes clear that the only reason excess profits tax returns were filed for the fiscal year 1945 was to show a basis for claiming an alleged unused excess profits credit carry-back. (R. 73-74.)

Moreover, under the California statutes, once the voluntary resolution to dissolve is passed by a corporation's stockholders it is thereafter prohibited from further engaging in business except for matters incident to winding up and the date of passing the resolution is considered the time at which proceedings for winding up commence. (California Corporations Code, Secs. 4600, 4604, 4605, Appendix *infra*.) Sections 5200 and 5201 of the California Corporations Code (Appendix, *infra*) requiring that a certificate of winding up and dissolution be filed contemplate the continuance of corporate existence "for the purpose of further winding up if needed", and by Section 5400 of the California Corporations Code (Appendix *infra*) the dissolved corporation

nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect

and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

Actions or proceedings to which the dissolved corporation is a party do not abate by dissolution. (California Corporations Code, Sec. 5401, Appendix, *infra*.) There is thus no merit to taxpayer's contention that it could not dissolve until tax controversies had been settled. (Br. 15.)

The only argument advanced by the taxpayer to show that it had not *de facto* dissolved on November 1, 1944, is that controversies existed with the Internal Revenue Service with respect to excess profits taxes and that it necessarily had to file various tax returns and claims after November 1, 1944. It should be mentioned that the taxpayer has not always contended that it had continued in existence after that date. See *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 203 P. 2d 522.

In the instant case the Tax Court was more than fair in allowing the taxpayer the benefits of a carry back during a seven months' period after it ceased to operate its business in which it could have easily completed all normal corporate activities incident to winding up. The same individuals were continuing to carry on an identical business under another form which was not subject to excess profits taxes, and no reason for dissolution appears in the record other than tax avoidance. The preparation of tax returns and claims under Section 722 could easily have been done after final dissolution. It should be noted that some of these returns were admittedly unnecessary (R. 74), and that the Section

722 claims have been denied.⁶ The record does not disclose any reason for prolonging taxpayer's existence without surrendering its charter other than the hope of further tax benefits. There is nothing in the record to warrant a finding that taxpayer retained its existence and substance as well as form. To permit the taxpayer here to continue to carry back a large excess profits credit simply by retaining its charter and doing nothing is totally contrary to the purpose of Congress in enacting Section 710(c).

In the case of *Wier Long Leaf Lumber Co. v. Commissioner*, *supra*, the facts involved were very similar to the facts in the instant case. In that case, on December 19, 1943, the directors and stockholders adopted a resolution to proceed promptly and in due order to accomplish the dissolution of Wier Long Leaf Lumber Company. By the end of 1942, the principal operating assets had been disposed of and a large distribution in liquidation had been made to the stockholders. Although the operating assets had been substantially disposed of in 1942, liquidation had not been formally completed at the time of the hearing before the Tax Court in May, 1946. On its 1943 and 1944 returns the taxpayer stated its business as "in liquidation." In that case (as in the instant case) the taxpayer introduced no evidence to explain why the liquidation had been prolonged despite the fact that the operating assets had been disposed of and business operations had in effect ceased in 1942. No reason was offered why the cash on hand in 1943 and 1944 had not been distributed to the stockholders.

⁶ The portion of the Tax Court's opinion dealing with the disallowance of the Section 722 claims forms part of the record in this case but is not included in the printed record.

The Wier Long Leaf Lumber Company took the same position as the taxpayer in the instant case is taking and contended that it should be allowed to carry back for each of the liquidation years 1943 and 1944 an amount which would eliminate all the taxes it had paid, because the excess profits tax credit is computed on the basis of average income for a period of years of normal business activity. The Court of Appeals for the Fifth Circuit held that taxpayer was entitled to an excess profits credit carry back from 1943 but not from 1944. In sustaining the Commissioner's position as to 1944 the court said (pp. 551, 553):

* * * the fact of liquidation and the particular circumstances and stages of it are relevant to the inquiry here, and * * * they may, indeed must, be inquired into.

* * * if it appears that the corporation is a corporation in name only, without corporate substance and serving no real corporate purpose, it must, though not formally dissolved, be treated as dissolved *de facto*.

* * * * *

* * * as to the year 1944 * * * the liquidation had by the year's end progressed to the point where there was no longer any valid reason for delaying dissolution, and the corporation, though not dissolved *de jure*, must be regarded, for the purpose of its claim to excess profits carry back for 1944 as *de facto* dissolved.

The court's holding in the *Wier Long Leaf Lumber Co.* case, *supra*, that the taxpayer there was entitled to

a carry back during the first year after it had commenced the liquidation of its operating assets, but not during the second year thereafter, fully supports the Commissioner's position here that the taxpayer was entitled to the carry back in neither the first nor the second year after this taxpayer had fully liquidated its operating assets. In the *Wier Long Leaf Lumber Co.* case, *supra*, taxpayer entered the year 1943, in which it was held to be entitled to a carry back, with assets worth nearly a million dollars. These assets included more than \$100,000 of accounts receivable, which were directly attributable, of course, to the operation of its regular business, and its assets were subject to liabilities of more than half a million dollars, also attributable to its regular business. It had only just begun its liquidation. On the other hand, the Wier Long Leaf Lumber Company entered 1944, the year in which it was held not entitled to a carry back, with approximately \$140,000 worth of assets and \$8,000 worth of liabilities and the court concluded that, since the corporation was without substance and served no real corporate purpose, it must, though not formally dissolved, be treated as dissolved *de facto*. The court called attention to the Texas statute which provides that a corporation is continued for three years after dissolution for the purpose of enabling those charged with the duty to settle up its affairs.

In *Aluminum Products Co. v. United States*, *supra*, the Court of Claims in denying a carry back to a personal holding company stated (p. 376) :

We think that the mere fact that in a statute relating to excess profits credits there is a reference to domestic corporations, does not show a statutory intention to allow every domestic corporation,

whatever its nature and taxable status, to have an excess profits credit.

In the *Eastern Grain Elevator Corp.* case, *supra*, the District Court held that where a corporation's liquidation had progressed to the point where it was ended except for certain matters that could have been arranged to be included in a plan of liquidation, a liquidation period of only six months was allowable during which the corporation was entitled to benefits of unused excess profits credits for a carry back. In that case the certificate of dissolution was filed December 28, 1944, and the court pointed out that by June 28, 1945, all the matters then pending could have been adjusted during the six months' period. There remained open (1) the right of the corporation to a postwar refund and carry back credit under the tax adjustment bill of 1945 which had not yet become effective; (2) setting up a fund of stockholders against liability of unknown claimants; and (3) the declaration of a final dividend. The court, however, allowed no carry back after June 28, 1945.

The case of *Wheeler Insulated Wire Co. v. Commissioner*, 22 T. C. 380, also involved a situation comparable to that in the instant case. A Connecticut corporation, which doubtless would have prospered had it gone on conducting its business during the war years of 1944 and 1945, voluntarily transferred its business and assets to an affiliated corporation leaving taxpayer with no business, no substantial income, and no excess profits net income. The Tax Court said (p. 384):

Congress had no reason or intention to allow a corporation thus denuded of its business and business assets to carry back unused excess profits

credits to earlier years, during which it had excess profits net income from its business, while that business continued to earn excess profits net income in the hands of a related corporation. Section 710(c) should not be interpreted to give relief where the conditions and the reasons for relief which Congress had in mind do not exist. *Diamond A Cattle Co., supra*, and cases there cited.

Again, in *Diamond A Cattle Co. v. Commissioner*, 21 T. C. 1, a taxpayer was operating successfully in 1945 with prospects of profits in the future when it voluntarily dissolved, thus preventing itself from making further sales. Its assets were transferred to the sole stockholder in liquidation. The Tax Court held that there was no justification for allowing a carry back since Congress intended the credit to be carried back only in cases where it was not needed in the tax year to offset normal earnings. It held that where the 1945 earnings were not normally low but were reduced merely by taxpayer's voluntary liquidation before the normal earning cycle was completed, there was no reason for applying the special relief provisions. As in this case there was no hardship.

In *Winter & Co. (Indiana) v. Commissioner*, 13 T. C. 108, the taxpayer had discontinued its business operations during the five-year cycle and had no earnings or expenses as an operating company for the year in which it claimed unused excess profits credit. The Tax Court said (p. 117):

If a corporation to which the provision for such credit is applicable should discontinue its operating functions after the lapse of a month, a year, or

two years, within such applicable period, we think it inconceivable that Congress intended that the excess profits credit was to apply not only to the operating years, but also to each of the remaining nonoperating years of the maximum authorized cycle. *For if there is no production there can be no excess profits income, potential or actual, and, hence, no occasion for the authorization of an excess profits credit. It follows that if, under the situation stated, no excess profits credit is allowable, there could be no excess profits credit to carry back.* [Italics supplied.]

Since the issue here is essentially one of fact, other decisions seemingly *contra* are all distinguishable on their facts. The case of *Mesaba-Cliffs Min. Co. v. Commissioner*, 174 F. 2d 857 (C. A. 6th), on which taxpayer relies (Br. 21, 32) was distinguished in the *Eastern Grain Elevator Corp.* and *Winter & Co.* cases, *supra*. In the *Mesaba* case, there was no liquidation and the taxpayer continued to function as a corporation and to make sales of iron ore during the year from which a carry back was allowed. Again, in *Whitney Mfg. Co. v. Commissioner*, 14 T. C. 1217 (Br. 24, 26, 32), the Tax Court found that the corporation had remained as a going business without taking any steps to liquidate, the sale of part of its assets being for the purpose of securing money to pay debts. The taxpayer also continued to operate its business in the years from which a carry back was allowed in *Coca-Cola Bottling Co. of Sacramento, Ltd. v. Commissioner*, 19 T. C. 282, supplementing 17 T. C. 101, affirmed on other grounds, *sub nom. Sellers v. Commissioner* (C. A. 9th), January 4, 1955.

The cases are likewise distinguishable on their facts allowing a carry back from the year in which a corporation engaged in nominal liquidation of remaining assets after having disposed of all operating assets at arm's length. *Craig, Trustee for Craig Furniture Co. v. Squire* (W. D. Wash.), decided March 2, 1954 (1954 P-H, par. 72,444); *Brainard v. Scofield* (W. D. Tex.), decided December 15, 1953 (1953 P-H, par. 72,835); *Myers, Trustee for Monticello Cotton Mills v. United States* (E. D. Ark.), decided January 5, 1952 (1952 P-H, par. 72,338); *Westover v. Smyth*, 99 F. Supp. 488 (N. D. Cal.); *Jos. Capps, Inc. v. United States*, 86 F. Supp. 712 (S. D. Cal.); *Bowman v. Glenn*, 84 F. Supp. 200 (N. D. Ky.), affirmed *per curiam*, 184 F. 2d 670 (C. A. 6th).

The cases relied on by the taxpayer (Br. 26, 28) dealing with annualization of income are not in point here. *United States v. Kingman*, 170 F. 2d 408 (C. A. 5th); and *Roeser & Pendleton, Inc. v. Commissioner*, 15 T. C. 966, affirmed on other grounds, *sub nom. M-B-K Drilling Co. v. Commissioner*, 194 F. 2d 221 (C. A. 10th).

The allowance of a carry back deduction, like other deductions, is a matter of legislative grace and the burden rests on the taxpayer to show his right to the deduction. *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, rehearing denied, 320 U. S. 809. This the taxpayer has failed to do. In the absence of a showing that the Tax Court was clearly erroneous in its finding that the taxpayer had *de facto* dissolved, on which the denial of a carry back depends, its decision should be affirmed. *United States v. Real Estate Boards*, 339 U. S. 485; *United States v. Gypsum Co.*, 333 U. S. 364, rehearing denied, 333 U. S. 869.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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JANUARY, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 710 [As added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

(a) [As amended by Sec. 201(a), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 202, Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) 90 per centum of the adjusted excess-profits net income, or

(B) an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter).

* * * * *

(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term “adjusted excess profits net income” in the case of any taxable year means the excess profits net income as defined in section 711) minus the sum of:

(1) [As amended by Sec. 205 (g), Revenue Act of 1942, *supra*] *Specific Exemption*.—A specific exemption of \$5,000, and in the case of a mutual insurance company (other than life or marine) which is an interinsurer or reciprocal underwriter a specific exemption of \$50,000;

(2) *Excess Profits Credit*.—The amount of the excess profits credit allowed under Section 712; and

(3) [As amended by Sec. 2(a), Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 204(a), Revenue Act of 1942, *supra*] *Unused Excess Profits Credit*.—The amount of the unused excess profits credit adjustment for the taxable year computed in accordance with subsection (c).

(c) [As added by Sec. 2(b), Excess Profits Tax Amendments of 1941, *supra*, and amended by Sec. 204(b), Revenue Act of 1942, *supra*] *Unused Excess Profits Credit Adjustment*.—

(1) *Computation of unused excess profits credit adjustment*.—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit*.—The term “unused excess profits credit” means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. For such purpose the excess profits credit and the excess profits net income for any taxable year be-

ginning in 1940 shall be computed under the law applicable to taxable years beginning in 1941. The unused excess profits credit for a taxable year of less than twelve months shall be an amount which is such part of the unused excess profits credit determined under the first sentence of this paragraph as the number of days in the taxable year is of the number of days in the twelve months ending with the close of the taxable year.

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b)(1).

(B) *Unused Excess Profits Credit Carry-Over.*— * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

SEC. 712 [As added by Sec. 201, Second Revenue Act of 1940, *supra*, and amended by Sec. 13, Excess Profits Tax Amendments of 1941, *supra*.] EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations*.—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. In the case of all other domestic corporations the excess profits credit for any taxable year shall be an amount computed under section 714. (For allowance of excess profits credit in case of certain reorganizations of corporations, see section 741.)

* * * *

(26 U. S. C. 1952 ed., Sec. 712.)

SEC. 713 [As added by Sec. 201, Second Revenue Act of 1940, *supra*, and amended by Sec. 4(a), Excess Profits Tax Amendments of 1941, *supra*, and Sec. 228(e)(2), Revenue Act of 1942, *supra*]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit*.—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations*.—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g), or

(C) Minus 6 per centum of the net capital reduction as defined in subsection (g).

* * * * *

(26 U. S. C. 1952 ed., Sec. 713.)

Revenue Act of 1945, c. 453, 59 Stat. 556:

SEC. 122. REPEAL OF EXCESS PROFITS TAX IN 1946.

(a) *In General*.—The provisions of subchapter E of chapter 2 shall not apply to any taxable year beginning after December 31, 1945.

(b) *Carry-Backs from Years After 1945, Etc.*—Despite the provisions of subsection (a) of this section the provisions of subchapter E of chapter 2 shall remain in force for the purposes of the determination of the taxes imposed by such subchapter for taxable years beginning before January 1, 1946, such determination to be made as if subsection (a) had not been enacted but with the application of the amendments made by subsection (c) of this section and section 131 of this Act.

* * * * *

Treasury Regulations 112, promulgated under the Internal Revenue Code:

Sec. 35.710-1 *Scope of Tax*.—The excess profits tax is imposed upon the adjusted excess profits net income of every corporation, both domestic and foreign, for each income-tax taxable year beginning after December 31, 1939, except certain corporations which are exempt. * * *

Sec. 35.710-2 *Measure of Tax*.—The adjusted excess profits net income upon which is based the excess profits tax for a taxable year is determined by deducting from the excess profits net income (determined under the provisions of section 711 applicable to such year) the sum of:

* * * * *

Sec. 35.710-3. *Unused Excess Profits Credit Adjustment*.—(a) *Unused excess profits credit*.—The unused excess profits credit for any taxable year beginning after December 31, 1939, is the excess of the excess profits credit for the taxable year over the excess profits net income, if any, for such taxable year. * * *

* * * * *

(b) *Unused excess profits credit adjustments*.—The unused excess profits credit adjustment is the aggregate of the portions of the unused excess profits credits for the two preceding and two succeeding taxable years which are treated under section 710 (c)(3) as unused excess profits credit carry-overs and unused excess profits credit carry-backs to the taxable year. Under the provisions of section 710(c)(3) the unused excess profits credit for any taxable year beginning on or after January 1, 1942, is carried back to each of the two preceding taxable years (not considering as a preceding taxable year any taxable year beginning before January 1, 1941) and forms part of the unused excess profits credit adjustment for such preceding taxable year. The unused excess profits credit for any taxable year beginning after December 31,

1939, to the extent it is not used as a carry-back, is carried forward to the two succeeding taxable years and forms part of the unused excess profits credit adjustment for such of those succeeding taxable years as begin after December 31, 1940. The amount which is carried back or carried forward is limited in the case of each such preceding or succeeding taxable year to the portion of the unused excess profits credit which was not applied against excess profits net income (either as part of the excess profits credit carry-over in the case of a taxable year beginning in 1940 or as part of the unused excess profits credit adjustment in the case of a taxable year beginning after December 31, 1940) in determining the adjusted excess profits net income for the taxable years, if any, before such preceding or succeeding taxable year. The amount of the unused excess profits credit which was so applied is determined as follows: The adjusted excess profits net income is computed for each such taxable year without the specific exemption of \$5,000 allowed by section 710(b)(1), and without credit of any carry-over or carry-back from the taxable year in which such unused excess profits credit arose or from any taxable year subsequent thereto. The unused excess profits credit, which is a carry-over or a carry-back to such taxable year, is considered to have been applied against the amount so computed.

The entire unused excess profits credit for any taxable year beginning after December 31, 1939, but not beginning after December 31, 1941, is carried over to the first succeeding taxable year. The

unused excess profits credit is carried over to the second succeeding taxable year to the extent it exceeds the adjusted excess profits net income for the first succeeding taxable year. For the purpose of determining this excess, the adjusted excess profits net income is computed without credit of the specific exemption of \$5,000 allowed by section 710(b) (1) and without credit of the carry-over from the taxable year in which the unused excess profits credit arose or of any carry-over or carry-back from a taxable year subsequent thereto. The entire unused excess profits credit for any taxable year beginning after December 31, 1941, is carried back to the second preceding taxable year if such taxable year began after December 31, 1940. If the second preceding taxable year began prior to January 1, 1941, the entire unused excess profits credit is carried back to the first preceding taxable year, since a taxable year beginning prior to January 1, 1941, is not considered a "preceding taxable year" for the purposes of section 710(c)(3), and no part of the adjusted excess profits net income for such a taxable year reduces the amount of the unused excess profits credit for a taxable year beginning after December 31, 1941, which may be carried back or carried over to other taxable years. If the second preceding taxable year began after December 31, 1940, the unused excess profits credit is carried back to the first preceding taxable year to the extent it exceeds the adjusted excess profits net income for the second preceding taxable year, such adjusted excess profits net income being computed without credit of the specific exemption of \$5,000

and without credit of any carry-back from the taxable year in which the unused excess profits credit arose. The unused excess profits credit is carried over to the first succeeding taxable year to the extent that it exceeds the aggregate of the adjusted excess profits net incomes for the two preceding taxable years (computed for each such taxable year without credit of the specific exemption of \$5,000 and without credit of any carry-back from the taxable year in which such unused excess profits credit arose or of any carry-back from a taxable year subsequent thereto), not considering as a preceding taxable year any taxable year beginning prior to January 1, 1941. The unused excess profits credit is carried over to the second succeeding taxable year to the extent that the unused excess profits credit exceeds the aggregate of the adjusted excess profits net income for the two preceding taxable years and for the first succeeding taxable year (computed for each such taxable year without credit of the specific exemption of \$5,000 and without credit of any carry-over or carry-back from the taxable year in which the unused excess profits credit arose or from any taxable year subsequent thereto), not considering as a preceding taxable year any taxable year beginning prior to January 1, 1941.

* * * *

Deering's California Corporations Code, Annotated (1947 ed.):

Sec. 4600. *Election by vote or consent of shareholders or members.* Any corporation may elect to

wind up its affairs and voluntarily dissolve by the vote or written consent of shareholders or members representing 50 percent or more of the voting power.

Sec. 4604. *When proceedings deemed to commence.* Voluntary proceedings for winding up the corporation are deemed to commence upon the adoption of the resolution of shareholders or directors of the corporation electing to wind up and dissolve, or upon the filing with the corporation of the written consent of shareholders thereto. However, if such proceedings are instituted because of the expiration of the term of corporate existence or other dissolution of the corporation, the proceedings for winding up are deemed to commence at the date of termination of its corporate existence.

Sec. 4605. *Cessation of business on commencement of proceeding: Notice of commencement.* When a voluntary proceeding for winding up has commenced, the corporation shall cease to carry on business except to the extent necessary for the beneficial winding up thereof. The directors forthwith shall cause written notice of the commencement of the proceeding for voluntary winding up to be given by mail to all shareholders and to all known creditors and claimants whose addresses appear on the records of the corporation.

Sec. 4800. *Directors to act as board in voluntary proceedings: Election of officers: Acts authorized by majority of directors as binding.* * * *

Sec. 4801. *Same: Powers and duties of directors.* The powers and duties of the directors after commencement of such proceedings include, but are

not limited to, the following acts in the name and on behalf of the corporation:

(a) To elect officers and to employ agents and attorneys to liquidate or wind up its affairs.

(b) To continue the conduct of the business insofar as necessary for the disposal or winding up thereof.

(c) To carry out contracts and collect, pay, compromise, and settle debts and claims for or against the corporation.

(d) To defend suits brought against the corporation.

(e) To sue, in the name of the corporation, for all sums due or owing to the corporation or to recover any of its property.

(f) To collect any amounts remaining unpaid on subscriptions to shares or any overpayments or unlawful distributions.

(g) To sell at public or private sale, exchange, convey, or otherwise dispose of, all or any part of the assets of the corporation, upon such terms and conditions and for such considerations as such board deems reasonable or expedient, and to execute bills of sale and deeds of conveyance in the name of the corporation. If sale or exchange of all or substantially all of the assets of a corporation for profit is made for a consideration consisting in whole or in part of shares, obligations, or securities of another corporation, domestic or foreign, or any consideration other than money, it shall be approved or ratified by the vote or written consent of holders of shares entitled to exercise a majority of

the voting power of the corporation, either before or after the action of the directors.

(h) In general, to make contracts and to do any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling, and liquidating the affairs of the corporation.

Sec. 5200. *Certificate of winding up and dissolution.* When a corporation has been completely wound up without court proceedings therefor, a majority of the board of directors or trustees shall sign a certificate of winding up and dissolution which shall be verified by their affidavit stating, in effect, that the matters set forth in the certificate are true of their own knowledge. The certificate shall state:

(a) That the corporation has been completely wound up.

(b) Whether its known debts and liabilities have been actually paid, or adequately provided for, or paid as far as its assets permitted, or that it has incurred no known debts or liabilities, as the case may be. If there are known debts and liabilities for payment of which adequate provision has been made, the certificate shall state what provision has been made, setting forth the name and address of the corporation, person, or governmental agency that has assumed or guaranteed the payment, or the name and address of the depositary with which deposit has been made, or such other information as may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability.

(c) Whether its known assets have been distributed to shareholders or members, or wholly applied on account of its debts and liabilities, or that it acquired no known assets, as the case may be.

Sec. 5201. *Same: Filings with Secretary of State and county clerk: Prerequisite showing of satisfaction of taxes.* The certificate of winding up and dissolution shall be filed in the office of the Secretary of State, and thereupon corporate existence shall cease except for the purpose of further winding up if needed. However, before any corporation taxed under the Bank and Corporation Franchise Tax Law may file a certificate of winding up and dissolution it shall file or cause to be filed with the Secretary of State the certificate of satisfaction of the Franchise Tax Commissioner that all taxes imposed under the Bank and Corporation Franchise Tax Law have been paid or secured.

A copy of the certificate of winding up and dissolution, certified by the Secretary of State, shall be filed in the office of the county clerk of the county in which the principal office of the corporation is located.

Sec. 5400. *Continued existence of dissolved corporations: Purposes for continued existence.* A corporation which is dissolved by the expiration of its term of existence, by forfeiture of existence by order of court, or otherwise, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and

divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

Sec. 5401. *Abatement of actions.* No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason or proceedings for dissolution and winding up thereof.



No. 14413

United States
Court of Appeals
for the Ninth Circuit.

CHARLES TESSEYMAN,

Appellant,

vs.

JOHN W. FISHER, LURENE W. FISHER and
UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

AUG 31 1954

PAUL P. O'BRIEN
CLERK



No. 14413

United States
Court of Appeals
for the Ninth Circuit.

CHARLES TESSEYMAN,

Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HENRY J. KLEEFISCH,
921 Mills Building,
San Francisco 4, Calif.

For Appellees Fisher:

COURTNEY L. MOORE,
1060 Mills Tower,
San Francisco 4, Calif.

For Appellee United States of America:

LAUGHLIN E. WATERS,
United States Attorney;
ROBERT H. WYSHAK,
Assistant U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.



United States District Court for the Southern
District of California, Central Division

No. 15662-T

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

PETITION FOR REMOVAL

To the United States District Court for the Southern
District of California, Central Division:

Your petitioner, the United States of America,
defendant in the above-entitled action respectfully
shows:

I.

On the 10th day of June, 1953, the United States
Attorney for the Southern District of California,
was served with a Summons and Complaint to quiet
title in an action filed in the Superior Court of the
State of California, in and for the County of San
Luis Obispo, as No. 19926, entitled John W. Fisher
and Lurene W. Fisher, Plaintiffs, vs. The United
States of America, Defendant. A true copy of said
summons and complaint is attached hereto and
marked Petitioner's Exhibit "A." Said Petitioner's
Exhibit "A" is a copy of all process, pleadings
and orders in this action served on said United

States Attorney. The time within which your petitioner is permitted to file the petition for removal of this suit to the United States District Court has not [2*] yet expired.

II.

Plaintiffs are seeking to quiet title to the real and personal property described in the complaint. Title 28 United States Code § 2410 sets out the consent of the United States of America, under certain conditions, to be named a party in a civil action to quiet title to real or personal property on which the United States has, or claims, a lien. The complaint alleges that this defendant claims an interest in said property because of certain Internal Revenue tax liens of record against Elaine Frances Tesseyman and Charles Tesseyman.

III.

The United States is given authority by 28 United States Code, Sections 1444 and 84 (b)(2), to remove this action from the Superior Court of the State of California, in and for the County of San Luis Obispo, to the United States District Court for the Southern District of California, Central Division.

Wherefore, your petitioner prays that this action be removed to this United States District Court for the Southern District of California, Central Division.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Dated: This 29th day of June, 1953.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney;

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue;

/s/ EDWARD R. McHALE,

Attorneys for Defendant-Petitioner, United States
of America.

Duly verified. [3]

PETITIONER'S EXHIBIT A

In the Superior Court of the State of California
In and for the County of San Luis Obispo

No. 19926

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

SUMMONS

Action brought in the Superior Court of the State
of California, in and for the County of San
Luis Obispo, and the Complaint filed in the
office of the County Clerk of said County.

The People of the State of California Send Greet-
ing to

The United States of America, Defendant.

You are Hereby Directed to Appear and answer
the complaint in an action entitled as above brought
against you in the Superior Court of the State of
California, in and for the County of San Luis
Obispo, within ten days after the service on you of
this Summons, if served within this County; or
within thirty days if served elsewhere, except that
if the action is against the State pursuant to Section

738.5 of the Code of Civil Procedure, within 180 days.

And you are notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and the Seal of the Superior Court of the State of California, in and for the County of San Luis Obispo, this 4th day of June, 1953.

[Seal]

A. E. MALLAGH,
Clerk,

By MARGARET MUZIO,
Deputy Clerk.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for him." (Sec. 1014 C.C.P.)

Answers or demurrers must be in writing, in form pursuant to rule of Court, accompanied with the necessary fee, and filed with the Clerk. [5]

In the Superior Court of the State of California,
In and for the County of San Luis Obispo

No. 19926

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Now Come the above-named plaintiffs and complain of the above-named defendant, and for cause of action allege:

I.

That plaintiffs are now and were at all times herein mentioned, husband and wife;

II.

That the Nash Building Company, Inc., is now, and was at all times herein mentioned, a corporation, organized and existing under and by virtue of the laws of the State of California and transacting business therein;

III.

That the plaintiffs are now and were at all times herein mentioned the owners in fee simple absolute of that certain real and personal property situate, lying and being in the County of San Luis Obispo, State of California, and particularly described as follows:

All that part of the West half of the Northwest quarter of Section 25, in Township 30 South, [6]

Range 12 East, Mount Diablo Base and Meridian, in the County of San Luis Obispo, State of California, more particularly described in the deed to John W. Fisher, et al., recorded in Book 455, Page 229 of Official Records on September 29th, 1947.

Together with the fixtures, stock in trade and personal property located at and in and on said real property above described. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining.

IV.

That defendant, the United States of America, is now and was at all times herein mentioned, a corporation sovereign;

V.

That said defendant claims and asserts an interest in said real and personal property hereinbefore described adverse to the ownership of the plaintiffs.

VI.

That said claim of said defendant arises out of the following facts: That on or about the 23rd day of March, 1949, plaintiffs herein as owners agreed to sell to the Nash Building Company, Inc., a corporation, the real and personal property described in Paragraph III hereof for the sum of \$155,000.00, and the said Nash Building Company, Inc., agreed to pay said sum to the plaintiffs herein; that said agreement of sale was in writing and consisted of

escrow instructions delivered by the plaintiffs herein together with the deed and bill of sale of said property to the Title Insurance and Trust Company, a corporation, at their office in San Luis Obispo. Said sum of \$155,000.00 to be paid on or before April 10, 1949, to the plaintiffs by the said Nash Building Company, Inc., upon an issuance of title insurance policy by said Title Insurance and Trust Company, and said deed and bill of sale were not to be delivered until the purchase amount of \$155,000.00 was paid into escrow. Time was made of the essence of said sale. That thereafter, on [7] April 11, 1949, said contract of sale and purchase set forth in said escrow instructions was amended and supplemented whereby the Nash Building Company, Inc., assumed the payment of an existing mortgage to the Bank of America and agreed through said escrow to pay to the plaintiffs herein the balance of said purchase price on or before August 15, 1949. That said Nash Building Company, Inc., did not, on August 15, 1949, or at any other time, or at all, pay the balance of said purchase price, less cost. Thereafter, on or about March 31, 1950, plaintiff herein caused to be served on said Nash Building Company, Inc., a demand that the balance of said purchase price be paid within 15 days from said March 31, 1950, to wit—by April 16, 1950; that thereafter, on April 21, 1950, plaintiffs herein caused to be filed in the Superior Court of the State of California, in and for the County of San Luis Obispo, a complaint against the said Nash Building Company, Inc., praying for judgment of the unpaid balance of

said purchase price in the amount of \$33,083.26, their pro rata of taxes, insurance, costs of suit and such other relief as the Court deemed proper. That said action was entitled: "John W. Fisher and Lurine W. Fisher vs. the Nash Building Company, Inc., a corporation, George B. Jovick, Charles Tesseyman, et al." At the time of the filing of said complaint, to wit—on April 21, 1950, plaintiffs caused to be recorded in the County Recorder's office of San Luis Obispo, in accordance with CCP of the State of California Section 409, a lis pendens giving notice of the pendency of said action to the world. That thereafter, on or about the 22nd day of December, 1950, said action came on duly and regularly to be heard and on said date a judgment was made, rendered and entered in said action in favor [8] of the plaintiffs for the recovery of \$37,001.17 from the defendant, the Nash Building Company, Inc., which judgment further ordered the sale of said real and personal property to pay said monetary judgment, said sale to be made by the Sheriff of the County of San Luis Obispo, State of California; that in accordance with said judgment after due and regular proceedings had to that end, the said Sheriff of the County of San Luis Obispo, State of California, did, on the 3rd day of May, 1951, conduct said sale in accordance with the judgment and order of said Court, and sold said property to the plaintiffs herein for the sum of \$37,168.43, subject to the mortgage held by the Bank of America, NT&SA, which said amount paid in full said monetary judgment. The plaintiff at

said sale was the highest and best bidder. That thereafter, on the 6th day of May, 1952, said Sheriff of the County of San Luis Obispo, State of California, executed and delivered his deed to the above-described real and personal property to the plaintiffs herein. That more than one year has elapsed since the delivery and recordation of said deed to the plaintiff from said Sheriff. That claim of said defendant which constitutes a cloud on the title of these plaintiffs, arises out of the filing with the County Recorder of the County of San Luis Obispo, State of California, of two income tax liens, which said tax liens were filed on April 27, 1950, after commencement of the action of "Fisher vs. Nash Building Company, Inc., et al.," and after the filing of the lis pendens hereinbefore mentioned, namely, a lien for \$12,568.43 claimed to be owed to the United States of America from Elaine Frances Tesseyman on account of income tax, and a lien for \$31,037.54 claimed to be owed to the United States of America from Charles Tesseyman on account of income tax.

VII.

That at no time did the defendant intervene or appear in [9] said action entitled "John W. Fisher and Lurine W. Fisher vs. The Nash Building Company, Inc., a corporation, et al." and set up any claim of any character that it might have by reason of said claimed tax liens against Elaine Frances Tesseyman and Charles Tesseyman, and as a result thereof said defendant is estopped by said judgment.

VIII.

That by 28 USCA Section 2410, the United States of America may be named as a party defendant in a civil action or suit to quiet title.

Wherefore plaintiffs pray that said defendant be required to set forth the nature of its claims and that said claims may be determined by decree of the Court, and that by said decree it be declared and adjudged that said plaintiffs are the owners of the said premises and that said defendant has no interest in or to said land and premises; and that said defendant be forever barred from asserting any claim whatever in or to said land and premises adverse to the plaintiffs, and for such other and further relief as to equity shall seem meet.

COURTNEY L. MOORE,
Attorney for Plaintiffs.

State of California,
San Luis Obispo—ss.

John W. Fisher, being first duly sworn, deposes and says:

That he is one of the plaintiffs named in the above-entitled complaint; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN W. FISHER.

Subscribed and sworn to before me this 4th day of June, 1953.

A. E. MALLAGH,
County Clerk and Ex Officio Clerk of the Superior
Court, County of San Luis Obispo, State of
California.

MARGARET MUZIO,
Deputy Clerk.

[Endorsed]: Filed June 4, 1953.

[Endorsed]: Filed June 29, 1953. [10]

United States District Court for the Southern
District of California, Central Division
Civil No. 15662-T

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

ANSWER

Comes Now, the defendant, United States of America, and answering plaintiffs' complaint to quiet title to real property, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Denies the allegations contained in paragraph III thereof.

IV.

Admits the allegations contained in paragraph IV thereof.

V.

Admits the allegations contained in paragraph V thereof.

VI.

This defendant is without knowledge or information sufficient to [11] form a belief as to the truth of the matters alleged in paragraph VI except that it admits the allegations of recording the recorded documents described therein, but denies any allegations of fact or conclusions of law contained in said documents, and except that defendant admits that it filed liens against Elaine Frances Tesseyman in the sum of \$12,568.43 and against Charles Tesseyman for the sum of \$31,037.54. In connection with said liens, defendant further alleges that the lien against Elaine Frances Tesseyman has been paid in full and that with respect to Charles Tesseyman, that on or about March 18, 1949, the Commissioner of Internal Revenue assessed against Charles Tesseyman income taxes for the year 1944 in the sum of \$23,717.19 taxes and \$5,635.92 interest, for a total assessment of \$29,353.53, and for 1945 income taxes in the sum of \$1,430.36 taxes and \$254.07 interest, for a total assessment of \$1,684.43; that the assessment list showing the assessment of the aforesaid taxes and interest was received in the

office of the Collector of Internal Revenue for the First District of California on or about March 18, 1949; notice and demand for the payment of the taxes and interest so assessed was made on the taxpayer shortly thereafter, and the sum of \$6,633.27, and no more, was paid in behalf of the 1944 taxes and the sum of \$1,684.43 was paid in behalf of the 1945 taxes, which totally satisfied the sum due on the 1945 taxes; on or about April 27, 1950, a notice of tax lien was filed in the office of the County Recorder of San Luis Obispo County, California, covering said taxes and interest in the total sum of \$31,037.54; remaining due, owing and unpaid is the sum of \$24,187.49 representing the balance of the assessment of the 1944 taxes, together with statutory interest which accrues on said balance at the rate of six per centum per annum from May 16, 1949, until paid; lien recording fees of \$1.00 have been incurred.

VII.

Denies the allegations contained in paragraph VII thereof.

VIII.

Admits the allegations contained in paragraph VIII thereof. [12]

As a Second, Separate and Alternative Defense, Defendant States That Paragraph VII of the Complaint Fails to State a Claim Against Defendant Upon Which Relief May Be Granted.

As a Third, Separate and Affirmative Defense, This Defendant Alleges as Follows:

I.

Defendant is informed and believes and based on its information and belief alleges that the plaintiffs entered into an escrow for the sale of the property described in paragraph III of the complaint and authorized the completion of the escrow and the delivery of the title to the property to the purchaser upon receipt of consideration in excess of \$120,000.00.

II.

That by completion of the escrow the taxpayer, Charles Tesseyman, acquired an interest in said property and the liens of the United States attached to his interest as alleged in paragraph VI of our answer hereinabove.

III.

That defendant is informed and believes and based on its information and belief alleges that plaintiffs brought suit against Nash Building Company, Inc., and Charles Tesseyman for the unpaid balance of the purchase price and treated said escrow as having been completed and did not elect to rescind the contract of sale.

IV.

That the plaintiffs are bound by their election in suing the Nash Building Company, Inc., and Charles Tesseyman and are therefore estopped from claiming any ownership interest except that which

results out of the judgment and deed of the Sheriff made on or about May 6, 1952, to plaintiffs.

Wherefore, having fully answered, the defendant prays that the Court adjudge the respective rights of the parties appearing in this action; that the property described in plaintiffs' complaint be sold as provided by law; that the proceeds of such sale be applied, first, to the expenses of such [13] sale and that the balance of such proceeds, if any, be applied in accordance with the priorities of the parties hereto as determined by law; that this defendant have its costs of suit in this behalf expended; that it have such other and further relief as to the Court may seem meet and proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney;

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 15, 1953. [14]

United States District Court, Southern District of
California, Central Division

Civil No. 15662-T

JOHN W. FISHER and LURENE W. FISHER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

CHARLES TESSEYMAN,

Applicant for Intervention.

MOTION TO INTERVENE AS A DEFENDANT

Charles Tesseyman moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation and that any and all right, title and interest claimed by the plaintiffs in said action in regard to said property is founded and rests upon a judgment of a court of the State of California which, on the face of the judgment-roll and the record in the action in which it was rendered and entered and otherwise, is shown to be null and void for lack of jurisdiction of the subject matter and, also, to have been procured by said plaintiffs through collusion and connivance with the Nash Building Company, Inc., and George H.

Jovick, defendants in said state court action, and their attorney Courtney L. Moore, who is now appearing in his real role as the attorney for the plaintiffs Fisher in the above-entitled action, and by reason of such matters and things and conditions this applicant for intervention has a defense to plaintiffs' alleged cause [16] and claim to relief against the federal income tax lien, presenting both questions of law and of fact which are common to the main action.

/s/ HENRY. J. KLEEFISCH,

Attorney for Charles Tesseyman, Applicant for Intervention.

NOTICE OF MOTION

To: Courtney L. Moore, Attorney for Plaintiffs.

To: Laughlin E. Waters and Robert H. Wyshak,
Attorneys for Defendant.

Please take notice, that the undersigned will bring the above motion on for hearing before the above-mentioned United States District Court at courtroom No. 6, Federal Building, City of Los Angeles, County of Los Angeles, State of California, on the 29th day of March, 1954, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ HENRY J. KLEEFISCH,

Attorney for Charles Tesseyman, Applicant for Intervention. [17]

[Title of District Court and Cause.]

INTERVENER'S ANSWER

First Defense

1. Intervener admits the allegations stated in paragraphs numbered 1, 2, 4, and 5 of the plaintiffs' complaint herein; denies the allegations in paragraph numbered 3, and denies the allegations in paragraph numbered 7 insofar as they assert that the United States of America is estopped from asserting any right or claim it has or might have under the Internal Revenue laws and regulations and its tax liens against this intervener, Charles Tesseyman, either severally or jointly with Elaine Tesseyman, his wife.

2. Intervener admits that an income tax lien in favor of [18] the defendant United States of America and against this intervener for \$31,037.54 and against Elaine Tesseyman for \$12,568.43 was filed in the office of the Recorder for the county of San Luis Obispo, state of California, on April 27, 1950, as in paragraph 6 of plaintiffs' complaint alleged, and this intervener further answers the allegations and matter set forth in said paragraph 6 as follows:

a) He denies that on March 23, 1949, or thereabouts the plaintiffs herein, John W. Fisher and Lurene W. Fisher, or either of them, agreed to sell to the Nash Building Company, Inc., a corporation, the real property or the personal property described in paragraph 3 of their complaint herein,

and alleges and says that on and prior to the 17th day of February, 1949, the said plaintiffs were the owners only of a three-fourths interest in said property, and Cleo S. Clinton and Loretta I. Clinton were the owners of the other one-fourth interest in said property, and all of them had made and executed and deposited with the Title Insurance and Trust Company, at its office in the city of San Luis Obispo, a deed to said real property to said Nash Building Company, Inc., together with a bill of sale to the said personal property, and the said Nash Building Company, Inc., had made and executed with a title company a deed to said real property to this intervener, Charles Tesseyman, together with a bill of sale to said personal property, for the purpose and object of inducing and inveigling this intervener to make and execute, and to deliver, to said Nash Building Company, Inc., the title papers necessary to transfer to it and by which he did transfer and convey to it the title and ownership of certain real property and personal property situate in the city and county of San Francisco, state of California, of the fair and reasonable market value of \$165,000, and which was subject only to an encumbrance of \$56,000.00;

Thereafter, and on or about the 23rd day of March, 1949, and [19] after the property so obtained from this intervener had been disposed of by and through the said Nash Building Company, Inc., a form or manner of agreement purporting to be an agreement of sale and purchase between the said

John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, as the apparent sellers, and the Nash Building Company, Inc., as the apparent buyer, was made up and prepared by said Title Insurance and Trust Company and was signed by the said parties thereto; that said alleged agreement consists entirely of escrow instructions and was so made up and prepared by said title company at the special instance and sole direction of George H. Jovick, the president and one of the only two stockholders of the said Nash Building Company, Inc.; that said alleged agreement contemplated the sale and purchase of said real property and personal property including stock-in-trade for a lump sum and at all times was and is such that it could not be specifically enforced nor made the basis of an action for foreclosure of a vendors' lien for the unpaid purchase price of land, in equity, for the reason stated herein that it undertakes and contemplates the sale and purchase, and on its face shows itself to be a contract in form for the sale and purchase, of real property and personal property including stock-in-trade, for a lump sum of \$147,500.00.

b) Intervener admits that on April 11, 1949, said alleged agreement of sale and purchase was amended and he alleges that Cleo S. Clinton and Loretta I. Clinton then were fully paid for their one-fourth interest in and to said property and they were so paid by and with moneys obtained by said Nash Building Company, Inc., and the plaintiffs

herein from the sale and disposition of the property obtained from this intervener as hereinbefore set forth and alleged, and thereupon the said Clintons ceased to have any rights or interest in the real property involved in this litigation, or under the said alleged agreement and escrow. He admits [20] that on and under date of April 21, 1950, an action was commenced in the superior court of the state of California, in and for the county of San Luis Obispo, by the plaintiffs herein, John W. Fisher and Lurene W. Fisher, as alleged and purported sole owners of the property involved in this litigation, and against the Nash Building Company, Inc., and George H. Jovick and this intervener, and that they caused a notice of the pendency of said action to be recorded as in their complaint herein alleged; and this intervener alleges and says that said action was one in equity for the specific performance of aforesaid alleged agreement of sale and purchase of both real property and personal property including stock-in-trade for a lump sum as aforesaid, and was and is numbered No. 17,800 upon the records of said superior court. He denies that by reason of any fact, and that by reason of any condition, and that by reason of the facts and conditions set forth in the plaintiffs' complaint herein, they had any cause of action or any ground for invoking the aid of a court of equity in said action No. 17,800, or upon which the equitable jurisdiction of the court could or did attach; that prior to and at the time of the commencement of said action No. 17,800 this

intervener had commenced and there was then pending in said superior court an action, in equity, to determine rights, claims and interests in and to said real property and said personal property asserted by the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Company, Inc., and the latter's two stockholders, George H. Jovich and Leonard R. Jacobson, adverse to this intervener, and to compel the delivery by them to him of the title papers to said real and personal property; that said action was commenced by this intervener on March 10, 1950, and was and is numbered No. 17,745 upon the records of said superior court and concurrently with the commencement of said action he caused a notice of pendency of said action, its nature, purpose and object, to be recorded in the office of the [21] Recorder for the County of San Luis Obispo, State of California; a copy of the complaint in said prior action No. 17,745 is attached hereto, marked Exhibit A, and made a part of this answer; that in and by said action No. 17,745 the said superior court acquired complete and exclusive jurisdiction of the said real property and personal property and of any and all rights and interests claimed by the plaintiffs in the subsequent action No. 17,800 and herein with respect to said property; that prior to the commencement of the latter action by them they had been served with a copy of the summons and complaint in said prior action and thereafter appeared and submitted their alleged claims to the court in said action.

Intervener further alleges and says that he appeared and filed an answer in said action No. 17,800 wherein he denied all the rights and equities undertaken to be set up and claimed by the said John W. Fisher and Lurene W. Fisher, the plaintiffs therein, and he specifically alleged and pleaded by way of defense that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of the complaint in said action and the exhibits attached thereto, to exist as to either the said real or personal property, the only agreement in respect of which specific performance was thereby sought being the alleged escrow agreement hereinbefore described, purportedly for the sale and purchase of real property and personal property including stock-in-trade, for a lump sum; and, also, the commencement and pendency of the said prior action No. 17,745; a copy of said answer is attached hereto, marked Exhibit B, and made a part of this answer.

c) Intervener admits that on or about the 22nd day of December, 1950, the said came on to be heard in said superior court upon the issues joined by the complaint and answer of this intervener, the Nash Building Company, Inc., and George H. Jovick not having appeared and filed any pleading and their default for [22] failure so to do was entered, and a form and manner of trial was had in said cause, the trial judge permitting this intervener to introduce in evidence the record and files of the court in

said prior action, but denying him the right to establish any right or claim to said real and personal property that would tend to defeat the plaintiffs' claim and informing this intervener that he could do that in his own action then pending in said court and on its calendar for trial;

That at the time of the trial of said action No. 17,800 and at the time of the rendering and entry of judgment therein, and for a long time prior thereto, Courtney L. Moore, the attorney of record for the plaintiffs herein, at all of said times was and still is an attorney at law for the said Nash Building Company, Inc., and its president George H. Jovick, and although he permitted a default to be entered against them in said action as hereinbefore stated, he appeared purportedly as the attorney for said defaulting parties on the trial and asked for and was granted leave to participate in the proceedings and soon undertook the prosecution of the action in the plaintiffs' behalf in cooperation, collusion, and association with A. V. Muller who appeared as their nominal attorney, and at the close of the trial made and prepared the findings of fact and conclusions of law which he presented to and had the trial judge sign as his decision in said cause, and this intervener is informed and verily believes and therefore alleges and charges that said action No. 17,800 was instituted by the plaintiffs herein by and through their collusion, connivance, confederation and conspiracy with the said Nash Building Company, Inc., and its presi-

dent George H. Jovick, as part of a plan and scheme conceived by the said Courtney L. Moore and A. V. Muller, to cast the said Nash Building Company, Inc., in judgment upon the aforesaid alleged agreement of sale and purchase, for the purpose and object cheating and defrauding this intervener out of his rights, estate, interest and claim in [23] and to said real property and said personal property and calculated to cut off and eliminate the income tax liens against said rights, estate, interest and claim of this intervener and taxpayer and of his wife Elaine in and to said property. He denies that any, and he denies that all, the circumstances alleged in said paragraph 6 in said complaint herein, vested the plaintiffs with the title to said property or any title or right sufficient in law or in equity to appear and ask for any relief herein.

Second Defense

The complaint fails to state a claim or right of action against the defendant United States of America upon which relief can be granted.

Third Defense

The plaintiffs John W. Fisher and Lurene W. Fisher in seeking equitable remedy and relief herein did not come into equity with clean hands; the Nash Building Company, Inc., was at all times material to their action No. 17,800 in the superior court set forth and alleged in their complaint herein, subservient to them, and its president, George H.

Jovick, and the acts of said corporation, and the participation of said corporation in the acts, transactions, and litigation, in the plaintiffs' complaint herein and in this answer set forth and alleged, ought in fairness and good conscience to be deemed to be the acts and participation of said plaintiffs, John W. Fisher and Lurene W. Fisher, and their attorney Courtney L. Moore, equity looking beyond the mere form that characterizes the procedure.

Fourth Defense

Said alleged judgment of the superior court of the state of California in and for the county of San Luis Obispo, so procured and made and entered in said action No. 17,800 as aforesaid, and all proceedings and rights, predicated thereon, were and are null and void, on the face of such judgment, and the judgment roll in said action, for lack of jurisdiction of the subject matter, and from the want of power to grant relief contained in the [24] judgment.

Wherefore, this intervening defendant having fully answered to the complaint, denies that the plaintiffs are entitled to the relief demanded, or any part thereof, and he prays that the judgment in the action No. 17,800 above described be declared, adjudged and decreed to be null and void, and for other proper relief.

H. J. KLEEFISCH,

Attorney for Intervener.

Duly verified. [25]

EXHIBIT A

In the Superior Court of the State of California in
and for the County of San Luis Obispo

No. 17745

CHARLES TESSEYMAN,

Plaintiff,

vs.

JOHN W. FISHER, LURENE W. FISHER,
CLEO S. CLINTON, LORETTA I. CLIN-
TON, GEORGE H. JOVICK, LEONARD R.
JACOBSON, NASH BUILDING CO., INC.,
CALIFORNIA PACIFIC TITLE INSUR-
ANCE COMPANY, and TITLE INSURANCE
and TRUST COMPANY,

Defendants.

COMPLAINT

(Declaratory Relief, etc.)

Plaintiff complains of the defendants and for
cause of action alleges, that:

1. At all times herein mentioned the defendants John W. Fisher and Lurene W. Fisher were and now are husband and wife; and plaintiff is informed and believes and upon such information and belief alleges that at all times herein mentioned the defendants Cleo S. Clinton and Loretta I. Clinton were and now are husband and wife.

2. At all times herein mentioned each of the defendants California Pacific Title Insurance Com-

pany, Title Insurance and Trust Company, and Nash Building Co., was, and now is, a domestic corporation, incorporated under the laws of the state of California.

3. During all of the time and times herein mentioned the defendants George H. Jovick and Leonard R. Jacobson have been, and at all the various times where they or the said George H. Jovick are or as hereinafter mentioned were, and still are, jointly and cooperatively conducting and transacting business and real estate operations and exchanges by and through the agency and instrumentality, and in and under the name, of Nash Building Co., Inc., one of the defendants herein.

As now and during all of said time and times they have always controlled and named, and they, the said George H. Jovick and Leonard R. Jacobson, do now control and name, by and through the ownership and control of all or substantially all of the issued shares of stock of said Nash Building Co., Inc., the directors and officers of said company, and the said defendants have always been and now are in full possession, control and dominion of the affairs, business and property or [26] whatever it may be of said defendant company, as plaintiff is informed and believes and therefore alleges, and have conducted, operated and controlled the same, as now, agreeable to their own interests, their own conveniences, their own resolves, and their own advantages and gains.

4. On February 10, 1949, the plaintiff was, and for a long time prior thereto had been, the owner and in possession of certain real property situate in the city and county of San Francisco, state of California, described as:

Beginning on the Southerly line of Eddy Street at a point distant thereon 137 feet and 6 inches from the Westerly line of Mason Street; running thence Westerly along the Southerly line of Eddy Street 55 feet; thence at a right angle Southerly 137 feet and 6 inches; thence at a right angle Northly 137 feet and 6 inches to the point of beginning;

with the building and improvements thereon consisting of a hotel building containing about 120 rooms, together with the furniture, furnishings, fixtures and equipment located and contained in or about said hotel building and premises, which said real and personal property then was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness amounting to \$56,000.00, and which property was and is known as the "Dunloe Hotel" and is hereinafter sometimes referred to as the "Dunloe Hotel property."

5. The defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton were, on the 10th day of February, 1949, and for a long time prior thereto, the owners and in possession of certain real property located on 101 Highway and situate partly within and partly outside the city of

San Luis Obispo, county of San Luis Obispo, state of California, and hereafter described; together with the buildings and improvements thereon and the furniture, fixtures and equipment located and contained in or about said buildings and premises, which said property was and is known as "Motel Inn" and is hereinafter sometimes referred to as the "Motel Inn property." On said 10th day of February, 1949, the said Motel Inn property was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness in the principal sum of \$46,032.01 with interest thereon at the rate of five (5%) per cent per annum.

6. On and prior to the 10th day of February, 1949, the defendant George H. Jovick had suggested and proposed to plaintiff that plaintiff trade and exchange his said Dunloe Hotel property hereinabove described, subject to the aforesaid deed of trust [27] and chattel mortgage indebtedness against said property in the amount of \$56,000, for the said Motel Inn property hereinabove mentioned and hereinafter described, subject to the aforesaid deed of trust and chattel mortgage indebtedness against said last mentioned property in the amount of \$46,032.01, together with the on-sale general liquor license issued by the State Board of Equalization of the State of California for the sale and dispensing of alcoholic beverages on said premises, and said George H. Jovick had informed plaintiff that such exchange and trade could be made, on said terms, provided that the exchange and trade

could be made, on said terms, provided that the exchange and trade be carried out and consummated by the plaintiff and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton making and executing, and depositing in escrow, the necessary instruments to transfer and convey to the defendant Nash Building Co., Inc., as an intermediate title holder, transferee, grantee, or "dummy," the title to their respective property involved, except the said liquor license, which was to be directly transferred to plaintiff, because the said defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton so insisted, directed and required; and, that, the plaintiff had notified the said George H. Jovick that he would make and consummate, and was ready to make and consummate, said exchange and trade of properties, on said terms and in said manner.

7. Pursuant to the terms and conditions of the aforesaid oral arrangements and understandings, for the exchange of said Dunloe Hotel property for said Motel Inn property, the plaintiff executed and acknowledged before a notary public, a deed and a bill of sale wherein the defendant Nash Building Co., Inc., was and is named as the grantee and vendee, respectively, and describing and conveying the title to said Dunloe Hotel property and, on the 10th day of February, 1949, deposited said deed and bill of sale in escrow with the defendant California Pacific Title Insurance Company; thereupon and prior to the 17th day of February, 1949, the

defendants George H. Jovick and Leonard R. Jacobson, under and in the name of the defendant Nash Building Co., Inc., and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, executed and acknowledged before a notary public the necessary deeds and bills of sale to transfer, convey and vest the title to the aforesaid Motel Inn property and deposited said deeds and bills of sale in escrow [28] with the defendants California Pacific Title Insurance Company and Title Insurance and Trust Company for delivery to plaintiff.

8. On February 17th, 1949, and while the aforesaid deed and bill of sale deposited by plaintiff in escrow with the defendant California Pacific Title Insurance Company, transferring and conveying the title to said Dunloe Hotel property as hereinbefore stated, were held by said defendant title company in escrow, the defendants George H. Jovick and California Pacific Title Insurance Company notified plaintiff and represented to him that it was absolutely necessary, if plaintiff desired to complete said exchange of properties and escrow, that plaintiff forthwith authorize and direct the defendant California Pacific Title Insurance Company, in writing, to deliver or record the said deed and bill of sale, and that if the plaintiff's end of said exchange, transaction and escrow was not immediately completed, and the said deed and bill of sale delivered or recorded, the instruments transferring and conveying the title of the aforesaid Motel Inn property

to plaintiff, which has been deposited with and then were held in escrow to complete the exchange transaction hereinbefore mentioned, would be withdrawn from said escrow.

9. Thereupon the plaintiff, on said 17th day of February, 1949, authorized and directed the defendant California Pacific Title Insurance Company, in writing, to deliver or record the said deed and bill of sale deposited by plaintiff in escrow with said defendant; that said written authorization was prepared by the defendants George H. Jovick and said title company and was signed by plaintiff at their instance, request and direction, and under the circumstances and by reason of the representations made by them as to the withdrawal of escrow instruments and the imperative necessity for said authorization as in paragraph 8 of this complaint set forth and alleged.

10. (a) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendant California Pacific Title Insurance Company on the 23rd day of February, 1949, caused said deed from plaintiff to said Nash Building Co., Inc., to be recorded in Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco.

(b) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendants George H.

Jovick and [29] Leonard R. Jacobson, under and in the name of the Nash Building Co., Inc., and as the president and secretary, respectively, of said defendant company, on and prior to said 23rd day of February, 1949, had made, executed and acknowledged before a notary public, and deposited with the defendant California Pacific Title Insurance Company, and on said day the said defendant title company caused to be recorded in Book 5128 of Official Records, at page 440, a deed transferring and conveying to one Charles Brown, a widower, the title to the same real property described in and transferred and conveyed by the aforesaid deed from the plaintiff to the defendant Nash Building Co., Inc., recorded in said Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco, and hereinabove mentioned and referred to; that prior to the recordation of said deeds the furniture, furnishings and equipment located and contained in or about the said Dunloe Hotel and described in and covered by the aforesaid bill of sale from plaintiff to the defendant Nash Building Co., Inc., were sold by and through the defendants George H. Jovick and Leonard R. Jacobson to three individuals, namely, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser.

(c) All the consideration for the aforesaid sale, transfer, conveyance and disposition of said Dunloe Hotel property to said Charles Brown, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser, and all the proceeds derived, accruing and resulting

therefrom, including a certain promissory note in the principal sum of \$14,104.19, made, executed and delivered by the said Louis Rosenberg, Rose Rosenberg and Mary Triebwasser to the Nash Building Co., Inc., and secured by a chattel mortgage covering the furniture, furnishings and equipment of said Dunloe Hotel, were received and retained by the defendants including the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton; said consideration and proceeds amounted in the aggregate to upwards of \$140,000.00 as plaintiff is informed and believes and therefore alleges, and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton receiving a substantial part thereof including the said promissory note and chattel mortgage.

11. Plaintiff alleges that by reason of the foregoing facts and circumstances, and of the terms and conditions of said exchange and trade of properties, given over and delivered or caused to be delivered all property and consideration stipulated and [30] agreed to be given and delivered by him in exchange for said Motel Inn property and the plaintiff thereby became entitled and ever since the 23rd day of February, 1949, has been and now is entitled to receive from the defendants the necessary and proper instruments to transfer and convey the title of said Motel Inn property to him.

12. The real property which was to be transferred and conveyed to plaintiff, under the terms

and in accordance with the conditions of said real estate transaction and escrow, in exchange for said Dunloe Hotel property which has been transferred, conveyed, sold and disposed of, as hereinbefore stated, is all that part of the West half of the Northwest quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, partly within and partly outside the city of San Luis Obispo, county of San Luis Obispo, state of California, and described as:

(Here follows legal description of Motel Inn property.)

13. Under and in accordance with the terms and conditions of said real estate transaction and escrow, and with the knowledge and consent of the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, the plaintiff entered into possession of said Motel Inn property, and the said defendants transferred or caused to be transferred to him the general on sale liquor license issued by the State Board of Equalization of the State of California for the sale of alcoholic beverages at said premises, and plaintiff ever since the 25th day of March, 1949, has been and now is in the actual possession and entitled to the possession of said Motel Inn property, as owner thereof, thus giving actual notice to the entire world that this plaintiff possessed and occupied the same.

14. Subsequently the plaintiff paid to the Bank of America National Trust and Savings Associa-

tion, at its branch in the city of San Luis Obispo, the holder of the aforesaid deed of trust and chattel mortgage indebtedness against and upon said Motel Inn property, interest which became due thereon, to wit, \$1,317.02 and, in addition thereto, \$1,682.98 on account of the principal of said indebtedness; and in all other respects the plaintiff has exercised and enjoyed all rights and incidents of ownership of the said Motel Inn property, and each and every part thereof.

15. All of said defendants above named claim some right, title or interest in or to said Motel Inn property above mentioned and described, adverse to this plaintiff and his ownership of said property, both real and personal, but plaintiff [31] alleges that none of said defendants have any right, title or interest in or to said real and personal property or to any part thereof either in law or in equity except as subject to the plaintiff's first and superior right and estate therein, and as his trustee and agent.

16. The claims to said Motel Inn property so made by the defendants cloud the title of plaintiff thereto, and tend to depreciate the market value thereof, and tend to depreciate the market value thereof, and prevent plaintiff from handling said Motel Inn property and premises in the manner most to his interests as owner thereof.

17. The defendants California Pacific Title Insurance Company, Title Insurance and Trust Com-

pany, Nash Building Co., Inc., George H. Jovick and Leonard R. Jacobson have in their possession or under their control the conveyances to transfer and vest the title and evidence of ownership to said Motel Inn property in this plaintiff, in accordance with the terms and conditions of the aforesaid real estate exchange transaction, but said defendants have failed and refused and still refuse to deliver such conveyances and evidences of ownership to this plaintiff and, contrary to the terms and conditions of said real estate exchange transaction which has been fully performed and completed so far as this plaintiff and his property was involved therein, as hereinbefore stated, the said defendants are attempting to compel this plaintiff to pay a sum of money which he did not agree to pay and in no way is obligated to pay, as a condition prerequisite for the delivery of such conveyances and evidence of ownership to him.

18. By reason of the premises, and of the foregoing claims, acts and refusals of the defendants to complete the real estate transaction and deliver the said conveyances and evidences of ownership to plaintiff, the plaintiff has sustained damage in the sum of \$50,000.00.

19. Plaintiff is ever ready and willing to do equity and to carry out his agreements and discharge his just obligations, and upon order of court, to pay into court the amount that may be found due to any of the defendants from this plaintiff, for escrow and title insurance charges or otherwise.

Wherefore, plaintiff prays judgment as follows:

1. That the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, [32] Loretta I. Clinton, George H. Jovick, Leonard R. Jacobson and Nash Building Co., Inc., to be adjudged and decreed to hold their said interest and record title to said Motel Inn property, situate in the county of San Luis Obispo, this state, as trustees for and in trust for this plaintiff, and that the said defendants be adjudged and decreed to deed or cause to be deeded and conveyed to the plaintiff Charles Tesseyman the said property subject to a deed of trust and chattel mortgage indebtedness not exceeding \$46,032.19;

2. That the defendants be directed and required to deliver to plaintiff a good and sufficient deed and bill of sale of said real and personal property, and that they pay to plaintiff the sum of \$50,000.00 as and for damage plaintiff has sustained because they did not deliver such deed and bill of sale to this plaintiff when the same should have been delivered; and that in the event of their neglect or failure so to do within a time to be fixed by the court, then that the clerk thereof, acting in the capacity of a commissioner or master in chancery, be appointed, authorized and directed by the court to make, execute and deliver said deed and bill of sale of said real and personal property to plaintiff;

3. That the court take cognizance of all matters set forth in this complaint and of all the rights and equities therein concerned and adjust the same;

that the defendants and each of them be required to make answer to this complaint and set forth the nature of their respective rights, claims and demands if any they have, that their rights, titles and equities, if any be found, and all adverse claims of each of said parties, be determined and adjudged subordinate and inferior to the rights and title of the plaintiff;

4. That the title of the plaintiff to said Motel Inn property, both real and personal, be quieted as against all of the said defendants, that plaintiff have judgment against the defendants jointly and severally for the sum of \$50,000.00 and for his costs and for such other and further relief as equity and the exigencies of the case may require and which may be just.

/s/ HENRY J. KLEEFISCH,
Attorney for Plaintiff.

(verification)

[Endorsed]: Filed March 10, 1950. [33]

EXHIBIT "B"

[Title of Court and Cause.]

ANSWER

of Defendant Charles Tesseyman.

The defendant Charles Tesseyman makes his answer and answers to the complaint herein as follows:

2. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph numbered III of said complaint, but said defendant denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part thereof, exclusive of the excepted liquor license, is subordinate or subject to any of the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim whatsoever of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

3. Said defendant denies, specifically and generally, conjunctively and disjunctively, each and every allegation in the complaint, not herein admitted, controverted or specifically denied, except that the allegations in paragraph numbered XI as to escrow instructions are admitted. And this defendant here and now adopts as part of his answer in this behalf the complaint filed by him in this court in an action in equity relating to the real and personal property involved in and sought to be affected by the present action, and wherein this defendant is plaintiff and the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Co., Inc., George H. Jovick, their associates and privies, are defendants, and which complaint and action in equity is numbered 17745 upon the records of this court, and copies of which complaint [34] in said action, which was pending at the time of the commencement of the present action, have been served upon the said John W. Fisher and Lurene W. Fisher, the plaintiffs herein, and the said Nash Building Co., Inc., George H. Jovick and others, insofar as the allegations in the complaint in said action No. 17745 are applicable to the defense of this answering defendant.

For a second, separate and distinct defense to the said complaint herein:

3. Defendant alleges that at the time of the commencement of this action, there was and is now pending in this court an action in equity brought by this defendant against the plaintiffs Jack W.

Fisher and Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, who are mentioned in the said plaintiffs' complaint herein and under whom they claim an interest in and to the real and personal property involved, and also the Nash Building Co., Inc., and George H. Jovick, their associates and privies, upon and with respect to the same real and personal property and transaction and escrow mentioned and described in the complaint herein, which action is numbered 17745 upon the records of this court and is still undetermined; that the said Jack W. Fisher and Lurene W. Fisher have been served with copy of summons and complaint in said action, and this court in said equity action can do complete justice between the parties and settle and dispose of the rights, claims, equities and priorities, if any, and give effect to their contracts legally made.

4. At the time of the commencement of said action numbered 17745, on the 10th day of March, 1950, this defendant caused a notice of the pendency of said action to be recorded in the office of the Recorder for the County of San Luis Obispo, State of California, and said notice, of which a copy is attached to this answer, marked Exhibit A, and made a part hereof, was recorded in Volume 555 of Official Records, at page 201, in the office of said county recorder. That, as appears by and from the complaint in said action and as this defendant alleges the fact to be, all the matters and things involved in this action are involved in the said former action. [35]

For a third, separate and distinct defense to the said complaint herein:

5. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph III of said complaint, but said defendant denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part of or either thereof, exclusive of the excepted liquor license, is subordinate or subject to the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim, if any, of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

6. Said defendant denies each and every allegation and statement contained in the paragraph numbered V of said complaint, and further answering the allegations and matter undertaken to be set forth in said paragraph, this defendant alleges and says that they are contrary to and are in contradiction and variance of the terms, provisions, conditions and stipulations set forth and contained in the

“Escrow Instructions,” attached to said complaint as Exhibit A thereto, subscribed by the plaintiffs herein.

7. Said defendant admits that the written escrow instructions attached to said complaint as Exhibits A and B thereto, were placed with the Title Insurance and Trust Company, at its branch in the city of San Luis Obispo, State of California, under its escrow number 41209, but he denies that said escrow instructions were given or so placed by the parties thereto, or any of them, under or pursuant to the alleged agreement of sale of said real and personal property or any part thereof, as in paragraph VII of said complaint alleged.

8. Said defendant denies that Cleo S. Clinton and Loretta I. Clinton or either of them have conveyed or transferred or assigned their right or title or interest in and to the alleged or supposed agreement of sale, or to the property [36] alleged to be covered thereby, or to any or all benefits, accrued or to accrue, from said escrow number 41209, to the plaintiffs John W. Fisher and Lurene W. Fisher, or either of them. He denies that ever since the date, if any, of the alleged transfer and assignment, the said plaintiffs have been or still are the owners, or either of them has been or still is the owner, of the said real and personal property, subject to the alleged agreement of sale. And further answering, in this behalf, this defendant alleges and says, that the said Cleo S. Clinton and Loretta I.

Clinton have been and were fully paid for any and all rights, interests, estates, titles and benefits that they or either of them, at the time of said escrow, had in or to said real property and said personal property, and that they were so paid through said escrow and with funds and monies deposited and paid into said escrow by the defendants Nash Building Co., Inc., and George H. Jovick and others, for the benefit of this defendant, and therefore the said Cleo S. Clinton and Loretta I. Clinton had nothing to transfer or convey or assign to the plaintiff herein and said plaintiffs are not before this court with clean hands.

9. Said defendant answers the allegations and matters set forth in paragraph X of said complaint, as follows: He denies that possession of the Motel Inn, with or without fixtures, or the stock-in-trade, or the personal property therein located or therewith connected, was delivered to the defendant Nash Building Co., Inc., or its designated agent, if any, and he denies that they or either of them, at the time of the commencement of this action were or was in possession of said property. He denies that the cash sum of \$61,840.94 has been delivered through said escrow to said plaintiffs, and alleges and says that the said sum was paid to the said plaintiffs, and the said Cleo S. Clinton and Loretta I. Clinton, and from which sum the said Cleo S. Clinton and Loretta I. Clinton have been fully paid for their right, title and interest in and to said property, as hereinbefore stated. Defendant admits

all the other allegations and statements in said paragraph X contained.

10. Defendant denies each and every allegation in the complaint, not herein admitted, controverted or specifically denied, and in particular denies the precise amounts of money stated, and any lesser amounts. [37]

For a fourth, separate and distinct defense to said complaint herein:

11. Said defendant alleges that the terms, provisions and conditions of the escrow instructions mentioned and referred to in said complaint, in all material matters and respects, including time and manner of performance by the alleged vendee, have been waived by the acts, conduct and doings of the vendor parties thereto, including the plaintiffs herein, and the said plaintiffs are, and each of them is, estopped to assert any claim or right to specific performance, or any right or claim in respect to or affecting the said property, real or personal, under or through said escrow instructions, and in particular the said personal property because, if it is true, which is denied, that the stipulated and agreed sale and purchase price for said personal property was and is \$37,500.00 then the plaintiffs and Cleo S. Clinton and Loretta I. Clinton, as the former joint owners and vendors thereof, by plaintiffs' own admission and showing in their complaint; and otherwise, have been paid and they have received through the escrow alleged in said complaint, the full amount

due and payable to them for said personal property, under and pursuant to such alleged agreement of sale.

Wherefore, defendant denies that the plaintiffs are entitled to the relief prayed for in the complaint, or any part thereof, or to any other relief whatsoever against this defendant, and prays that the complaint be dismissed as to him with costs assessed against the plaintiffs, and for such other and further relief as may be just and proper.

/s/ H. J. KLEEFISCH,
Attorney for Defendant,
Charles Tesseyman.

(Verification.) [38]

EXHIBIT A

In the Superior Court of the State of California,
in and for the County of San Luis Obispo

No. 17,745

CHARLES TESSEYMAN,

Plaintiff,

vs.

JOHN W. FISHER, LURENE W. FISHER,
CLEO S. CLINTON, LORETTA I. CLIN-
TON, GEORGE H. JOVICK, LEONARD R.
JACOBSEN, NASH BUILDING CO., INC.;
CALIFORNIA PACIFIC TITLE INSUR-
ANCE COMPANY, and TITLE INSUR-
ANCE AND TRUST COMPANY,

Defendants.

NOTICE OF PENDENCY OF ACTION

To Whom It May Concern:

Take Notice that an action has been commenced in the above-entitled Court, by the above-named plaintiff, against the above-named defendants, which action is now pending; that the general object of said action is for a declaration and determination that the plaintiff is the owner, in possession and entitled to the possession of the real property and premises in the complaint in said action, and hereinafter, described, and to determine all and every claim, estate or interest therein asserted by said

defendants, or either or any of them, adverse to the said plaintiff, and for other and general relief.

The real property and premises involved in, and to be affected by said action is all that part of the West Half of the Northwest Quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, and partly within and without the City of San Luis Obispo, in the County of San Luis Obispo, State of California, particularly described as follows:

“Beginning at a point on the North boundary line of the City of San Luis Obispo, as said line is defined in the Charter of said City, approved by the Legislature of the State of California, by Resolution adopted Feb. 23, 1911, distant thereon 1506.5 feet West from the Northeast corner of said City and also 16.8 feet East from a stone monument 4"x14"x10" set in said boundary line, and running thence North 12° 16' West, 22 feet to an iron stake set in the southerly line of the California State Highway; thence along said line on the following courses [39] and distances, by a right curve of 430 feet radius, 73.2 feet to a concrete monument set for Sta. 1+55.7 of the official survey of said highway; thence North 68° 14' East 236.6 feet to a concrete monument; thence by a right curve of 220 feet radius 99.6 feet to a concrete monument; thence South 85° 46' East 119.5 feet to a concrete monument; thence by a left curve of 330 feet radius 296.6 feet to a concrete monument; thence North 42° 52' East 44 feet to a stake; thence leaving said line of

said highway and running South $0^{\circ} 13'$ East 234 feet to a stake on the Northerly bank of the San Luis Obispo Creek; thence along said bank South $51^{\circ} 34'$ West 106.2 feet; South $86^{\circ} 39'$ West 200 feet; South $78^{\circ} 43'$ West 192 feet; South $39^{\circ} 22'$ West 130.8 feet to an iron stake; thence leaving said creek bank and running North $12^{\circ} 16'$ West 333 feet to the point of beginning.

“Saving and excepting therefrom that portion thereof conveyed to the State of California for highway purposes by deed dated January 21, 1946, and recorded in Book 402 of Official Records at page 437, records of said County, described as follows:

“All that part of the portion of the West one-half of the Northwest quarter of Section 25, Township 30 South, Range 12 East, Mount Diablo Base and Meridian, conveyed to George H. Jovick by deed dated March 7, 1944, and recorded in Book 358 of Official Records at page 465, records of said County, which lies North of the following described line:

“Beginning at a point on the Northerly boundary line of the City of San Luis Obispo as said line is defined in the charter of the said City, approved by the Legislature of the State of California by Resolution adopted February 23, 1911, distant along said Northerly boundary line, Westerly 18.75 feet from the stone monument described in the above-mentioned deed as having dimensions $4'' \times 14'' \times 10''$; thence (1) from a tangent which bears North

50° 59' East, along a curve to the right, with a radius of 370 feet, through an angle of 17° 15' for a distance of 111.40 feet, the Northeasterly 73.2 feet last-described course being a portion of the Northerly boundary line of the parcel of land conveyed in the above-mentioned deed; thence, continuing along said Northerly boundary line, (2) North 68° 14' East 236.60 feet; thence continuing along last said boundary line (3) along a curve to the right tangent to last-described course, with a radius of 220 feet, through an angle of 0° 39' 13" for a distance of 2.51 feet; thence leaving said boundary line (4) South 88° 55' East, 169.36 feet; thence (5) North 85° 03' 50" East, 343.45 feet to a point on or near the Easterly boundary line of the parcel of land described in the above-mentioned deed distant South 20° 03' 50" East, 88.59 feet from a concrete monument set at the Southwesterly terminus of the course described as 'North 42° 52' E., 44 ft.,' in last said deed; thence (6) continuing North 85° 03' 50" East, 100 feet."

Dated: March 6th, 1950.

H. J. KLEEFISCH,
Attorney for Plaintiff.

(Affidavit of service by mail.)

[Endorsed]: Filed July 26, 1950.

[Endorsed]: Filed March 17, 1954. [40]

[Title of District Court and Cause.]

AFFIDAVIT OF COURTNEY L. MOORE IN
OPPOSITION TO MOTION OF CHARLES
TESSEYMAN TO INTERVENE

State of California,
City and County of San Francisco—ss.

Courtney L. Moore, being first duly sworn, deposes and says:

That he is an attorney at law, duly admitted to practice in the Courts of the State of California and in the District Courts of the United States for the Southern District of California, Central Division; that in the actions referred to in the proposed answer of intervener, namely, action No. 17745, entitled Charles Tesseyman vs. John W. Fisher, et al., and action No. 17800, entitled John W. Fisher, et al., vs. Nash Building Co., et al., filed in the Superior Court of the State of California, in and for the County of San Luis Obispo, your affiant represented Nash Building Co., George H. Jovick and Leonard R. Jacobson, and is familiar with all of the facts in connection with the said litigation; that George H. Jovick was at all times president of the Nash Building Co., a California [42] corporation; that your affiant had, prior to the events hereinafter set forth, represented said George H. Jovick as his attorney in other matters; that shortly prior to December 6, 1950, said George H. Jovick communicated with your affiant and informed him that he and the Nash Building Co. and Leonard

R. Jacobson had been sued in two actions pending in San Luis Obispo County, to wit: actions Nos. 17745 and 17800; that the said George H. Jovick at said time informed your affiant that he had been seriously ill, and for a period of time had not been expected to live, and was at the time he communicated with your affiant an ill and sick man;

That your affiant investigated the status of the said litigation and learned that in the action entitled John W. Fisher, et al., vs. Nash Building Co., No. 17800, the default of the Nash Building Co., George H. Jovick and Leonard R. Jacobson had been entered of record and that they were in default in the action entitled Tesseyman vs. Fisher, et al., No. 17745, but that no default had been entered; that thereupon your affiant secured from Henry J. Kleefisch, attorney for said Charles Tesseyman, an extension of time to plead for said defendants in said action entitled Tesseyman vs. Fisher, et al.; that at said time said action entitled John W. Fisher vs. Nash Building Co. had been set for trial for the 8th day of December, 1950:

That at the time of said conference with the said George H. Jovick said George H. Jovick displayed to your affiant copies of the escrow instructions which had been deposited with the Title Insurance and Trust Company of San Luis Obispo, and informed your affiant that the Nash Building Co. had, in accordance with said escrow instructions, agreed to purchase from the said John W. Fisher, Lurene W. Fisher, his wife; Cleo S. Clinton and Loretta I.

Clinton, his wife, real and personal property in San Luis Obispo known as the Motel Inn, for the sum of \$155,000; that the total purchase price had not been paid; that after investigation your [43] affiant informed the said George H. Jovick that in his opinion it was futile to file a motion to set aside said default for the reason that the only relief would be under Section 473 of the Civil Code of Procedure of the State of California, and in order to make a motion under said section it was necessary for defendants against whom a default had been entered to make an affidavit of merit, to wit: that they had a meritorious defense to said action, and that in the opinion of your affiant neither said Nash Building, George H. Jovick or Leonard R. Jacobson had any meritorious defense to said action; that in the action entitled *Tesseyman vs. Fisher, et al.*, as appears by Exhibit A attached to the proposed answer of said intervener, said Tesseyman prayed for monetary judgment in the sum of \$50,000, and your affiant informed said defendants, namely, Nash Building Co., George H. Jovick and Leonard R. Jacobsen, it was necessary to defend said action; that said action entitled *Fisher vs. Nash Building Co., et al.*, had been set for trial for the 8th day of December, 1950; that your affiant at said time proceeded to San Luis Obispo representing said defaulted defendants, and for the first time met or conversed with A. V. Muller and/or John W. Fisher, or any other party to said action, all of whom, up to that time, had been complete strangers to your affiant; that in said action your

affiant, representing the said Nash Building Co., George H. Jovick and Leonard R. Jacobson, admitted in open court the due execution of said escrow instructions and the signing of the same by the said Fisher, Clintons and Nash Building Co.; that said George H. Jovick did not accompany your affiant to San Luis Obispo for the reason that his doctor had told him that it might imperil his life to make such a trip;

That thereafter your affiant prepared and filed an answer for said Nash Building Co., George H. Jovick and Leonard H. Jacobson in the action entitled *Tesseyman vs. Fisher, et al.*, No. 17745, [44] denying the various allegations of the complaint therein, a copy of which answer is attached to this affidavit marked Exhibit A and made a part hereof; that thereafter the said action entitled *Tesseyman vs. Nash Building Co.*, No. 17745, was set for trial for the 9th day of January, 1951, and was in fact tried in part on the 9th and 10th days of January, 1951, and was continued to the 15th day of February, 1951, for the purpose of taking, in the interim, the deposition of George H. Jovick, which deposition was taken in San Francisco for the reason that because of his health he was under doctor's orders and it was impossible for him to be and appear in said action; that at the time of the taking of the said deposition said Henry J. Kleefisch was present and examined the said George H. Jovick, and said deposition was entered in evidence at the date set for said continuance, to wit, February 15, 1951.

During the course of the trial the following witnesses were summoned and examined: John W. Fisher, Leonard R. Jacobson, George H. Jovick, George E. McCraith, Allen S. Mobley, Charles Tesseyman, Arthur E. Giubini;

That it appears by the allegations of the complaint in the action entitled *Tesseyman vs. Fisher, et al.*, that the said Charles Tesseyman made the same claim which he is making in the present answer in intervention;

That after a full and complete hearing in said Superior Court action at which witnesses were sworn and in which action the said Charles Tesseyman was sworn as a witness and was examined by counsel, namely: Henry J. Kleefisch and Reed M. Clarke, the Honorable Anthony Brazil, presiding Judge, decided there was no merit in the claim presented by the said Charles Tesseyman; that co-defendants in said action were the Title Insurance and Trust Company, of San Luis Obispo, and California Pacific Title Insurance Company, of San Francisco, both of whom were represented by [45] counsel and presented evidence; and that said court at said time held that said title companies had acted in good faith and that said escrow instructions were not prepared and made up by the said title companies at the specific instance and request of said George H. Jovick, but were prepared at the request of all parties concerned.

Answering the allegations contained on page 4 of said answer in intervention affiant denies that

in said action No. 17800 brought by the said John W. Fisher, et al., or that there was no cause of action, for said Superior Court of the State of California held that there was a cause of action, and that it had jurisdiction of the same, and rendered a judgment against said proposed intervener, which judgment was affirmed by the District Court of Appeal of the State of California, and a hearing in the Supreme Court of the State of California was denied.

Affiant admits said action No. 17745 was commenced by the said Charles Tesseyman and admits as stated by said Tesseyman, that said Superior Court acquired complete and exclusive jurisdiction of said real and personal property and of any and all rights and interests claimed by the plaintiffs in the subsequent action No. 17800, which said court recognized as existing rights and in said actions said court adjudicated the rights of said parties.

Your affiant denies that at the time of rendering and entering said judgment in action No. 17800 and for a long time prior thereto, that your affiant was the attorney for the Nash Building Co., in this connection refers to the statements heretofore made; denies that your affiant permitted a default to be entered against said parties in said action but as heretofore stated, your affiant again repeats that said defaults were entered in said action before he even knew of the existence of said litigation; denies that he undertook the prosecution of said action on the plaintiff's behalf; admits that the court did

permit him to appear and state the position [46] of the Nash Building Co.; denies that he did in any way act in cooperation, collusion or association with the said A. V. Muller, the attorney for the said Fishers in said action, and as heretofore stated, that for the first time it was in said action that your affiant first met the said A. V. Muller; denies that your affiant prepared the findings of fact or conclusions of law in said action, and in this connection states that they were prepared by the said A. V. Muller without consultation with your affiant, and in the usual manner pursued by attorneys having successfully prosecuted a suit, and which were, in accordance with California law, served on your affiant as attorney for the defendants. Denies that said action No. 17800 brought by the said Fisher was instituted by the plaintiffs through collusion, connivance, confederation and conspiracy with the Nash Building Co., or its president, George H. Jovick, or as part of any plan or scheme conceived by your affiant and the said A. V. Muller to cast the said Nash Building Co. in judgment upon any alleged agreement of sale and purchase for the purpose and object of cheating and defrauding the proposed intervener, and in this connection repeats the statements heretofore made, that said action was brought by said Fishers and said Clintons at a time when the said George H. Jovick was ill and not expected to live, and defaults were entered before said Jovick ever consulted with your affiant; that it is not true that your affiant in any way joined in or had any object or purpose in

cheating or defrauding said Charles Tesseyman out of any rights, interest or claim in or to any real or personal property or calculated to cut off and eliminate any income tax liens against said rights, and in this connection your affiant states that he was unaware of the existence of any income tax lien or of any income tax owing by said Tesseyman and/or his wife, until after the decision of the District Court of Appeals of the State of California on the 3rd day of December, 1952, when, for the first time, affiant knew or heard of [47] any such liens; that your affiant learned of said liens by being informed of their existence by the said John W. Fisher; that during the progress of said trials and the appeals to the District Court of Appeals of the State of California, your affiant over a period of approximately two years became acquainted with the said John W. Fisher; that after the said John W. Fisher learned of said tax liens he informed your affiant that he had discussed the matter with the said A. V. Muller, and the said A. V. Muller had informed the said John W. Fisher that he did not feel himself competent or informed so as to be capable of handling an income tax controversy, and suggested to said John W. Fisher that he secure other counsel, and the said John W. Fisher at said time requested your affiant to act for him in said income tax matter, which was the first time your affiant had in any way acted for or represented the said John W. Fisher.

Your affiant denies each and all of the allegations and statements contained in the second, third and

fourth defense set forth in said proposed answer in intervention and your affiant further states that said Charles Tesseyman and Elaine Tesseyman at all times herein set forth were represented by able counsel of their own choice, Henry J. Kleefisch and Reed M. Clarke, attorneys duly licensed to practice before the courts of the State of California; your affiant further, by reference, embodies as a part of this affidavit each and all of the statements of fact and law found in the decisions of *Fisher v. Nash Building Co.*, 113 CA2d 397, and *Tesseyman v. Fisher, et al.*, 113 CA2d 404.

/s/ COURTNEY L. MOORE.

Subscribed and sworn to before me this 19th day of March, 1954.

[Seal] /s/ FRANCES R. WIENER,
Notary Public in and for the City and County of
San Francisco, State of California. [48]

Memorandum of Points and Authorities

Rule 3 of the U. S. District Court provides that failure of the moving party to file any instruments or memorandum of points and authorities shall be deemed a waiver by the moving party of the pleading or motion. Rule 3 expressly provides that the moving party shall serve and file with the notice of motion such a memorandum. The moving party has failed to do so.

The pleading accompanying motions to intervene should set up interests of intervenor.

Rule 24 of Civil Procedure of District Courts.

An intervention introducing litigation having no relation to that opened by original complaint will not be permitted.

Rule 24

Babcock v. Town of Erlanger,
34 Fed. Supp. 293

Final judgment of a state court cannot be collaterally attacked except on the basis of extrinsic fraud, even if the allegations of the intervenor's answer would be true, they show on the face of it that there is no extrinsic fraud. Summarizing, then, they merely state that the attorney for one of the defendants conspired with the attorney for the plaintiff.

Throckmorton vs. U.S. 98 U.S. 61

Pico vs. Cohn, 91 Cal. 129

Applicant attacks two judgments rendered by the Superior Court of the State of California, in and for the County of San Luis Obispo, and affirmed by the District Court of Appeals of the State of California, both of which courts had jurisdiction of the subject matter, and such judgment is not open to collateral attack.

Dowdy v. Hawfiell, 189 F. 2d 637

Respectfully submitted,

/s/ COURTNEY L. MOORE,
Attorney for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed March 22, 1954. [49]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MARCH 29, 1954

At: Los Angeles, Calif.

Present: Hon. Ernest A. Tolin,
District Judge.

Proceedings: For hearing on motion of Charles Tesseyman for leave to intervene as party-defendant.

Plaintiff orally moves to strike motion of Chas. Tesseyman, and Court Orders that said motion of Chas. Tesseyman to intervene is Denied.

It Is Further Ordered that def't U.S.A. have 15 days from this date to file reply brief to plaintiff's brief heretofore filed, and plaintiff will either file a reply thereto or notify the Court they will not; whereupon on such advice from plaintiff's counsel, the cause will stand Resubmitted.

Attorney for Chas. Tesseyman makes exceptions to the Court's ruling denying motion to intervene.

EDMUND L. SMITH,
Clerk,

By WM. A. WHITE,
Deputy Clerk. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles Tesseyman, applicant for intervention above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final order entered in this action on March 29, 1954, denying his motion for leave to intervene herein as a party defendant.

Dated: this 28th day of April, 1954.

/s/ HENRY J. KLEEFISCH,
Attorney for Charles Tesseyman, Applicant for
Intervention.

[Endorsed]: Filed April 29, 1954. [52]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
TRANSCRIPT OF RECORD

Upon application of H. J. Kleefisch, attorney for the above-named applicant for intervention, and pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, it is

Ordered, that said applicant for intervention be granted thirty days additional time, and to and including July 7, 1954, to file the transcript of record on his appeal in this action.

Dated: May 26, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed May 26, 1954. [55]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 55, inclusive, contain the original Petition for Removal; Answer; Motion to Intervene as a Defendant; Affidavit of Courtney L. Moore in Opposition to Motion of Charles Tesseyman to Intervene; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for March 29, 1954, which constitute the transcript of record on the appeal of Charles Tesseyman to the United States Court of Appeals for the Ninth Circuit.

I further certify that the case was tried on the merits on March 1, 1954, and time fixed for the filing of briefs whereupon the cause was to stand submitted for decision; that the court filed its Memorandum of Decision on April 16, 1954, and that Findings of Fact, Conclusions of Law was filed on May 25, 1954, and that the Decree Quieting Title was filed and entered on May 25, 1954. I also certify that no affidavits in opposition to the motion for leave to intervene were filed except the one in the transcript of record.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 1st day of July, A.D. 1954.

[Seal]

EDMUND L. SMITH,

Clerk,

By /s/ THEODORE HOCKE,

Chief Deputy.

[Endorsed]: No. 14413. United States Court of Appeals for the Ninth Circuit. Charles Tesseyman, Appellant, vs. John W. Fisher, Lurene W. Fisher and United States of America, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 2, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14413

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs and Appellees,

vs.

THE UNITED STATES OF AMERICA,
Defendant,
CHARLES TESSEYMAN,
Intervener and Appellant.

STATEMENT OF POINTS

The appellant states that the points upon which he intends to rely on the appeal taken by him in this action are as follows:

1. Appellant made timely application in the district court for permission to intervene as a party defendant, under the circumstances disclosed by the record in this case, and the district court's ruling, denying his application for permission to intervene, on the sole ground that it was not timely, was and is erroneous.

2. Appellees did not come, into court, and were not before the district court, in an action of purely equitable cognizance, with clean hands.

/s/ HENRY J. KLEEFISCH,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 13, 1954.

No. 14,413

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES TESSEYMAN,

Appellant,

VS.

JOHN W. FISHER, LURENE W. FISHER,
and UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

BRIEF FOR APPELLANT.

HENRY J. KLEEFISCH,

921 Mills Building, San Francisco 4, California.

Attorney for Appellant.

FILED

DEC 15 1954

PAUL P. O'BRIEN,
CLERK



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No. 14,413

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHARLES TESSEYMAN,

Appellant,

VS.

JOHN W. FISHER, LURENE W. FISHER,
and UNITED STATES OF AMERICA,

Appellees.

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE AND OF THE APPEAL.

The appellant, Charles Tesseyman, has appealed to this Court of Appeals from an order of the United States District Court for the Southern District of California, Central Division, denying his motion for intervention as a party defendant, in an action brought by John W. Fisher and Lurene W. Fisher, as plaintiffs, against the United States of America, as sole defendant therein, to quiet title to certain real property and personal property located in San Luis

Obispo County, in the Southern District of California, upon which the United States of America has, or claims an interest or tax lien, under the Internal Revenue Laws of the United States, for an income tax deficiency against the appellant and applicant for intervention.

The action was commenced on June 4, 1953, by the filing of a complaint in the office of the clerk of the Superior Court of the State of California in and for the County of San Luis Obispo. (R. 8-14.) The complaint alleges, as a basis for the relief sought by the plaintiffs, that they are, and were at all times mentioned therein, the owners in fee simple of the property in litigation, and the defendant United States of America claims and asserts an interest in said property adverse to the ownership of plaintiffs (R. 8-9), and by Section 2410 of Title 28 of the United States Code it is provided that the United States may be named as a party defendant in a civil action or suit to quiet title. The complaint further alleges, that the defendant's claim which constitutes a cloud on the plaintiffs' title arises out of an income tax lien in favor of the defendant and against the appellant herein, Charles Tesseyman, for \$31,037.54 which had been filed with the Recorder for the County of San Luis Obispo. (R. 12-13.)

In the complaint, plaintiffs allege their source of ownership of the property to be a judgment in their favor in an action brought by them in the Superior Court of the State of California in and for the County of San Luis Obispo against Charles Tesseyman and

others to recover the unpaid balance of the purchase price claimed to be due under a contract for the sale of the property, real and personal, for the lump sum of \$155,000 (R. 10-11) and a sale of the property made to the plaintiffs under the judgment which was recovered after the tax lien was filed. (R. 11-12.)

Pursuant to a petition for removal of the action which was filed in the United States District Court for the Southern District of California, Central Division, by the defendant, United States of America, on June 29, 1953 (R. 3-5), the cause was removed and thereafter, on September 15, 1953 the defendant filed its answer in the action in the District Court to which it was removed. (R. 14-18.)

Defendant in its answer, denied that the plaintiffs are the owners of the property in controversy and, after admitting that it has, and claims, an interest in and lien upon the property adverse to plaintiffs, set forth the specific facts giving rise to such interest and lien; and as a separate and distinct defense, defendant alleged inter alia that the plaintiffs entered into an escrow for the sale of the property and authorized the completion of the escrow and the delivery of the title to the property to the purchaser upon receipt of consideration in excess of \$120,000; that by the escrow transaction the taxpayer Charles Tesseyman acquired an interest in the property to which the lien of the United States against him attached; and further, the plaintiffs by having brought the action against him and others for the unpaid balance of the purchase price, treated the escrow as

having been completed and waived election to rescind the contract of sale; and prayed judgment:

“that the Court adjudge the respective rights of the parties appearing in the action; that the property described in plaintiffs’ complaint be sold as provided by law; that the proceeds of such sale be applied, first, to the expenses of such sale and that the balance of such proceeds, if any, be applied in accordance with the priorities of the parties hereto as determined by law; * * *”
(R. 14-18.)

On March 1, 1954, issues having been joined by the complaint and answer, the case was tried on the merits, and time fixed for the filing of briefs whereupon the cause was to stand submitted for decision. (R. 68.) On March 17, following, Charles Tesseyman, the appellant herein, filed his motion to intervene as a party defendant in the case. In his motion appellant alleged and stated as grounds therefor:

“Charles Tesseyman moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation and that any and all right, title and interest claimed by the plaintiffs in said action in regard to said property is founded and rests upon a judgment of a court of the State of California which, on the face of the judgment-roll and the record in the action in which it was rendered and entered and otherwise, is shown to be null and void for lack of jurisdiction of the subject matter and, also, to

have been procured by said plaintiffs through collusion and connivance with the Nash Building Company, Inc., and George H. Jovick, defendants in said state court action, and their attorney Courtney L. Moore, who is now appearing in his real role as the attorney for the plaintiffs Fisher in the above-entitled action, and by reason of such matters and things and conditions this applicant for intervention has a defense to plaintiffs' alleged cause and claim to relief against the federal income tax lien, presenting both questions of law and of fact which are common to the main action." (R. 19-20.)

A proposed answer setting forth an intervening claim and defenses supplemented by two exhibits, marked "A" and "B" with an exhibit accompanying the latter, marked "A", were filed jointly with said motion. (R. 21-55.) A copy of the proposed answer and exhibits, as they appear in the printed record, are set forth in an appendix to this brief.

The motion came up for hearing on March 29, 1954, and the minutes of the Court contain the following entry and order:

"Proceedings: For hearing on motion of Charles Tesseyman for leave to intervene as party-defendant.

"Plaintiff orally moves to strike motion of Chas. Tesseyman, and Court Orders that said motion of Chas. Tesseyman to intervene is Denied.

"It is Further Ordered that def't U.S.A. have 15 days from this date to file reply brief to plain-

tiff's brief heretofore filed, and plaintiff will either file a reply thereto or notify the Court they will not; whereupon on such advice from plaintiff's counsel, the cause will stand Resubmitted.

"Attorney for Chas. Tesseyman makes exceptions to the Court's ruling denying motion to intervene." (R. 66.)

Thereafter, on April 16, 1954, the District Court filed its Memorandum of Decision, and on May 25, following, Findings of Fact and Conclusions of Law were filed and a Decree Quieting (Plaintiffs') Title was filed and entered in the action. (R. 68.)

Upon this statement of the case, and the record in this cause, the appellant submits the following—

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THIS UNITED STATES COURT OF APPEALS HAS JURISDICTION TO REVIEW ON APPEAL THE ORDER APPEALED FROM, AS REQUIRED BY SAID COURT'S RULE 18.

1. Jurisdiction of the District Court is conferred by, and was invoked under, Section 1331, Section 1444, and Section 84(b)(2) of Title 28 of the United States Code. Section 1331 provides that the District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3000, exclusive of interest and costs, and arises under the laws of the United States. Under Sections 1444 and 84(b)(2) the United States is given authority to remove this action from the Superior Court of the State of California, in and for the County of San Luis Obispo (where it was commenced), to the United States District Court for the

Southern District of California, Central Division, (to which it was removed and where it was pending and undetermined at the time of the application for intervention).

2. The order appealed from was entered on the 29th day of March, 1954, as appears from page 66, of the printed record herein. The notice of appeal was filed on the 28th day of April, 1954, as appears from page 67, of the printed record herein.

3. The statute believed to sustain appellate jurisdiction is Section 1291 of Title 28 of the United States Code, which provides that the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States except where a direct review may be had in the Supreme Court.

In this connection, it is to be noted, that the Federal Rules of Civil Procedure (Rule 24) regulating intervention divides intervention into two types: intervention of right; and permissive intervention. Denial of intervention as of right is appealable. See *Mack v. Passaic National Bank & T. Co.*, 3 Cir. (1945), 150 F. 2d 474; *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 91 L. Ed. 1646, 67 S. Ct. 1387. It has thus been held that an order denying leave to intervene is appealable where intervention was essential to preservation of applicant's rights (*Washington v. U. S.*, 9 Cir., 87 F. 2d 421, rev'g. 11 F. Supp. 675; *U. S. v. Radice*, 2 Cir., 40 F. 2d 445), and amounts to denial of relief (*Long v. Stites*, 6 Cir., 63 F. 2d 855).

Denial of permissive right to intervene is appealable for the trial Court's abuse of discretion. See *Palmer v. Guaranty Trust Co. of N. Y.* (1940), 2 Cir., 111 F. 2d 115; *American Brake Shoe & F. Co. v. Interborough R. T. Co.*, 2 Cir., 112 F. 2d 669; *Papaliolios v. Durning* (1949), 2 Cir., 175 F. 2d 73 (where the Court reversed the denial of a motion for intervention where the denial was not made in the exercise of discretion but on an erroneous conclusion of law); *Mullins v. DeSoto Securities Co.* (1943), 5 Cir., 136 F. 2d 55; *Deauville Associates v. Eristavitchitcherine* (1949), 5 Cir., 173 F. 2d 745. See also, *Credits Commutation Co. v. U. S.*, 177 U.S. 311, 44 L. Ed. 782, 20 S. Ct. 636; *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 88 L. Ed. 1188, 64 S. Ct. 905.

ERRORS RELIED ON.

An examination of many cases in which intervention has been granted or denied discloses that it is the accepted and usual practice of the forum, in granting or denying intervention, for the Court to render an opinion and decision which states the grounds or reasons for its action.

In the instant case, however, the District Court did not follow such accepted and usual course in denying the appellant's application for intervention. Nothing appears in the Court's order denying the application that in any manner indicates upon what ground or for what reason its action was predicated, the order

merely setting forth that the “motion of Chas. Tesseyman to intervene is Denied.”

So here, without anything appearing in the order upon which any more specific error may be assigned, the only error assignable to the District Court’s ruling must necessarily be, and it is limited to, that it erred in denying appellant’s motion for leave to intervene.¹

SUMMARY OF ARGUMENT.

The appellant’s motion for intervention as a party-defendant and to file his proposed answer for relief, pursuant to Rule 24 of the Federal Rules of Civil Procedure and decisions of Federal Courts, regulating intervention, should have been granted.

The problems and propositions relied upon and presented to this Court by appellant, in support of the above contention, and all of which are related or incident to the alleged error of the District Court’s order complained of, may fairly be summed up as follows:

Application for intervention in this quiet title action before final submission and decision was timely, the motion states the grounds therefor and was accompanied by a pleading, supplemented by exhibits, setting forth the cross-claims and defenses upon which intervention was sought and right of the appellant

¹In fairness to the judge who presided in the District Court on the hearing of the motion, it may be permissible to remark that, he stated from the bench, it was denied on the ground that it was not made timely.

pro interesse suo was based and which are of a nature and status essentially such as are contemplated and provided for by Rule 24 of the Federal Rules of Civil Procedure as well as other grounds for intervention recognized and established by the United States Supreme Court; and all the well pleaded allegations of which pleading, on application for intervention, are taken as true. The Court was fully informed of the grounds on which the intervention was sought, including grounds based on the unsanitary condition of the hands of the plaintiffs, by which a defense in addition to the issues of the main action was presented.

The points made will be presented under headings as follows:

(1) The application for intervention in the instant quiet title action was timely.

(2) The intervention should have been allowed as matter of right.

(3) There are common questions of law and fact in the main action and in the proposed intervention, the granting of which would have neither unduly delayed nor prejudiced the adjudication of the rights of the original parties, and the District Court in the exercise of its discretion, and duty, should have permitted the intervention sought in this case under Rule 24(b) and firmly rooted principles of equity.

Most of the essential and physical facts and circumstances of the case appear in the statement of the case set forth in a preceding portion of this brief,

with record references, and the portion of the record (appellant's proposed pleading) which is set out in an appendix to this brief. Any necessary elaboration or statement of record matter vital to the ground of error which is made the basis of this appeal, or which may be necessary or conducive to a clear presentation or explanation of the points relied upon by appellant for reversal of the order from which the appeal herein was taken, and on which the decision of this cause depends, as well as to a lucid explanation of the relevancy, pertinency, force, and importance of such points in their bearing upon general law, principles of equity, and questions raised on the record, will be, and are, made in the course of the ensuing discussion of the case and argument.

ARGUMENT.

POINT ONE. THE APPLICATION FOR INTERVENTION IN THE INSTANT CASE TO QUIET TITLE WAS TIMELY.

The appellant's motion to intervene was filed pursuant to provisions of Rule 24 of the Federal Rules of Civil Procedure. Rule 24 recognizes two categories, namely, intervention as a matter right; and permissive intervention in the discretion of the Court.¹ In either case the application must be timely, but the rule does not specifically set forth the time for intervention.²

²Rule 24 of the Federal Rules of Civil Procedure provides:

“(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right

An application for intervention, in a case of the nature as is the instant one, made after trial but before final submission of the cause for decision is timely. The right to intervene is not foreclosed where no decision or judgment has been entered in the case.

“Parties who are not named may intervene and make themselves actual parties, so long as the proceedings are *in fieri* and are not definitely closed by the course and practice of the court.”

Omaha Hotel Co. v. Wade, 97 U.S. 13, 24 L.Ed. 917, at page 919.

In the next place, the timeliness of an application for intervention depends on the time of the particular proceeding to which the application relates and the origin of the right sought to be asserted by the intervention. *Missouri-Kansas Pipe Line Co. v. United States* (1941), 312 U.S. 502, 85 L.Ed. 975, 61 S.Ct. 666. In other words, the question whether or not a movant should be permitted to file an appearance as an interested party to be heard must ultimately

to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

“(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. * * *

rest upon the quality of the right he seeks to assert or defend in the particular case. *United States v. E. I. Dupont De Nemours & Co.*, 13 F.R.D. 487.

The record before this Court on this appeal, as previously pointed out, shows that the appellant sought leave to intervene as a party-defendant in the action, in order to assert against the plaintiffs the cross-claims and defenses set forth in his proposed answer, on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation and against which property the defendant United States as a tax lien claimant against the taxpayer and appellant Tesseyman is seeking, in this action, to enforce a tax lien under the internal revenue laws by foreclosure of the lien and sale of the property.

Appellant further alleged and stated, as a ground for intervention, that any and all right, title and interest claimed by the plaintiffs in this action in regard to the property involved in the litigation is founded and rests upon the validity of a judgment of a California Court which, on the face of the judgment-roll and the record in the action in which it was rendered and entered and otherwise, is shown to be null and void for lack of jurisdiction of the subject-matter and, also, to have been procured by said plaintiffs through collusion and connivance with Nash Building Company, Inc. and George H. Jovick, defendants in said state Court action, and their attorney Courtney L. Moore, who is now appearing in his real role as attorney for John W. Fisher and

Lurene W. Fisher, the plaintiffs in that and in the instant action. These features of the case will be further discussed with supporting authorities in later portions of this brief.

Rules providing for intervention are remedial and under the general rule the view is usually taken that such a rule should be liberally construed, in order to effect its purpose. For liberal construction in interpreting the rules with reference to intervention consult: *Brotherhood of Locomotive Engineers et al. v. Chicago, M. St. P. & P. R. Co. et al.*, 34 F. Supp. 594; *Securities and Exchange Comm. v. United States R. & I. Co.*, 310 U.S. 434, 84 L.Ed. 1293, 60 S.Ct. 1044; *United States v. C. M. Lane Lifeboat Co., Inc.*, 25 F. Supp. 410; *Id.* 2 Cir., 118 F. 2d 793; *Western States Mach. Co. v. S. S. Hepworth Co.*, (D.C.N.Y.) 37 F. Supp. 377, 67 C.J.S. 976-977. In *Western States Mach. Co. v. S. S. Hepworth Co.*, 2 F.R.D. 145 at page 146, with reference to Rule 24(a), the Court said:

“This rule as well as all the other rules of the Federal Rules of Civil Procedure should be construed with great liberality as they were intended.”

Furthermore, a rule of Court as to time for intervention obviously is inapplicable where the applicant had no notice or knowledge of the commencement or pendency of the action until about the time he filed his motion for leave to intervene. Here no claim has been made that the appellant herein did not make his application for intervention at the earliest oppor-

tunity or immediately after he became aware of the pendency of the action.

The case of *Senne v. Conley et al.*, 110 Colo. 270, 133 P. 2d 381, is authority for the view that where there is no statutory provision as to time within which application to be made a party to an action shall be made, a person who makes his application at the earliest possible opportunity is deemed to have made it in time. Similarly, the Court of another jurisdiction has held that where the right or privilege is given by statute, a requirement not expressly provided for by the statute will not be imposed in the absence of a cogent reason therefor. See *Massachusetts Bonding etc. Co. v. Novotny*, 200 Iowa 227, 202 N.W. 588.

Self-evidently, rules relating to and regulating intervention are not to be administered by varying, springing whims or caprices, or the unregulated discretion of the individual chancellor in the particular case. Of course, elevated and uniform justice could not be administered without rules. But in the last analysis, rules are not the ultimate end, the main thing; that main thing is justice itself. The rules are only in aid of the promotion of justice—the guideposts by which it is reached.

POINT TWO. THE INTERVENTION SHOULD HAVE BEEN ALLOWED AS A MATTER OF RIGHT.

The next problem that seems to require discussion is whether the appellant *pro interesse suo* was entitled to intervene as of right in the instant case. Inter-

vention of rights is predicated upon the principle that the interests of the intervener are such that he may suffer of his rights or some substantial prejudice thereto if he is not represented in the action. *Palmer v. Bankers Trust Company*, 10 Cir., 12 F. 2d 747.

Rule 24(a) deals with intervention of right and sets forth three grounds of such intervention of which only the second and third grounds are material here. Rule 24(a) (2) provides for intervention "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant may be bound by a judgment in the action"; and Rule 24(a)(3) recognizes the absolute right "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the Court or of an officer thereof."

Any burden of showing why appellant should be permitted to intervene as a party-defendant, and that this was a proper case for intervention as a matter of right, under Rule 24(a)(2) or Rule 24(a)(3) or both, is met by contents of the plaintiffs' complaint, the answer of the defendant United States, and the appellant's proposed answer (of which a copy is set forth in an appendix to this brief).

In compliance with the requirement that on the application for intervention, the proposed complaint or answer must state a well pleaded claim or defense (*Continental & Commercial Trust & S. Bank v. Allis-Chalmers Co.* (D.C. Wis.), 200 F. 600), appellant with his motion tendered his proposed answer in which he set forth a statement containing a chain of

facts and circumstances in connected legal and logical form such as is required in good pleading, supplemented by exhibits, showing that the action is one which really and substantially involves adverse and valuable claims to property and property rights and defenses, personal to appellant, based on legal or equitable grounds or both, for the purpose of aiding the defendant United States to resist the claims and pretenses of the plaintiffs (Fisher) and to enforce its tax lien, as tax lien claimant, against appellant and the property in litigation and in the custody and control of the Court, and protecting an interest of his own which plaintiffs were seeking to suppress, conceal and evade, and as to which the defendant and its counsel were not familiar and it hardly seems necessary to add, would not, and could not, be adequately represented by the plaintiffs or their versatile counsel; and asking for affirmative and equitable relief, independent from that of the plaintiffs and the defendant in the original action.

It is to be observed, in connection with the allegations of appellant's proposed answer tendered with his motion, that it is well established that on the application for intervention, the well pleaded allegations of the proposed pleading will be taken as true. This statement finds support in *Atlantic Refining Co. v. Port Lobos Petroleum Corp.*, 280 F. 934, and *United States v. Northern Securities Co.*, 128 F. 808.³

³In view of the rule that on application for intervention the well pleaded allegations of the proposed pleading will be taken as true, we have deemed it unnecessary, therefore, to expand this brief with an extended discussion of the nature, structure and

At the time when appellant filed his motion to intervene as a party defendant in this action to quiet title and for the enforcement and foreclosure of a federal income tax lien against him, the trial Court had custody and control of the real and personal property, either actually or constructively, the distribution or other disposition of which would have adversely affected appellant, who had a vital interest in the proper determination of the plaintiffs'

contents of an affidavit (R. 56-64) made and filed by plaintiffs' counsel, Courtney L. Moore, in opposition to the motion for intervention in which attempt is made to join issue with allegations of the proposed answer tendered by appellant with his motion, with the intent to have the District Court dispose of the issues on the hearing of the motion in a summary manner, especially the allegations imputing fraud, collusion, connivance and practices on the part of Mr. Moore well within the realm of gross misconduct in procuring the judgment against the taxpayer and appellant Tesseyman which he has, as author of the complaint in the instant case, sought to make the basis of the plaintiffs' claim of ownership of the property in litigation and their right to relief from the federal tax lien against Tesseyman.

Whatever value the affidavit may have is in its admission that Tesseyman had commenced an action in the Superior Court, it being No. 17,745, as alleged in his proposed answer, by which the Court "acquired complete and exclusive jurisdiction" of the "real and personal property" and of "any and all rights and interests" claimed by the plaintiffs (Fisher) in a subsequent action, No. 17,800, commenced by them in the same Court, with respect to the same property and asserted claims and rights in relation thereto, in which the judgment pleaded by him for and in behalf of his clients, the Fishers, in the instant action, was recovered; and in showing that fraud, imposition, deceit and falsehood can only be maintained by persistence in practices, not less vicious than pernicious.

The rule seems to be that if fraud, oppression or undue influence is charged, the Court is not concluded by the record, but may inquire into the real facts of the transaction. *Woodcock v. Petroleum Corp.*, 48 Cal. App. 2d 652, 120 P. 2d 889. This concurs with the principle that equity Courts possess broad powers and should exercise them so as to do substantial justice. So here, where the record contains an affidavit made and filed by an attorney which contains unqualified positive statements to the effect

status and right to any relief, as against the tax lien or otherwise, under well established rules of law and principles of equity.

If this Court will examine the answer accompanying the motion for intervention and proposed to be filed in the District Court, in detail, it will be found that facts and circumstances are stated which show not only that appellant had an interest in the subject matter of the litigation that he would gain

that he had nothing whatever to do with the preparation or entry of a judgment which he has set up and pleaded in an action, as here, for relief, it may not be irregular or improper to quote an extract or two from the duly certified reporter's transcript of the record of proceedings had on the trial of the action in which the specific judgment was entered, to show what the actual and true facts are.

Mark the actual situation. On pages 104-104 of that transcript of the record, it appears as follows:

"The Court. I think in this case the judgment should be for the plaintiff, and I think that you gentlemen, while you are here, should sit down and try to work out an equitable decree in this matter, and a judgment. Don't you think so?

Mr. Moore. Yes, but I suggested to Mr. Muller I'd like—

The Court. Prepare it and submit it.

Mr. Moore. Yes, I think we more or less understand each other.

* * * * *

Mr. Kleefisch. We are not waiving findings, Your Honor.
* * *

The Court. All right, but I have indicated the type of judgment I want to make.

Mr. Muller. Yes, I think I understand.

The Court. You understand it, Mr. Moore?

Mr. Moore. Yes, sir."

And what were the findings of fact that Mr. Moore prepared and had the Court sign, as a basis for the judgment? The clerk's certified transcript (page 46) shows them merely to be as follows: "I. That each and all of the allegations set forth in the complaint of plaintiffs on file herein are true. II. That each and all of the allegations and denials set forth in the answer of defendant, Charles Tesseyman, to the complaint of plaintiffs on file herein, inconsistent with the findings of fact stated in the preceding paragraph hereof are untrue."

or lose by the direct legal operation of the judgment, and that his interests were not adequately represented by existing parties, and further that he had property rights in the property in litigation not the least of which was the right of having it applied to the discharge and satisfaction of the federal income tax lien against him that would be affected by the Court's judgment and such as Rule 24(a) of the Federal Rules of Civil Procedure contemplate intervention for the assertion and protection of, but the intervention sought is not a conventional form of intervention whereby an appeal is made to the Court's good sense to allow a person having a common interest with the formal parties to enforce his common interest with his individual emphasis.

In *Missouri-Kansas P. L. Co. v. United States* (1941), 312 U.S. 502, 85 L.Ed. 975, 61 S.Ct. 666, the Supreme Court held that Federal Rule 24(a) is not a complete inventory of interventions allowable of right. And in *United States v. Columbia G. & E. Co.* (D.C. Del.), 27 F. Supp. 116, App. Dis. 108 F. 2d 614, cert. den. 309 U.S. 687, 84 L.Ed. 1030, 60 S.Ct. 887, the Court observed that Rule 24(a)(3) does not specifically set forth the nature of the interest in the property which a person must have in order to establish his claim to intervention as a matter of right.

Nothing is more firmly established than that possession by a Court of the res draws to that Court all controversies concerning the res. Hence, a Federal Court may, irrespective of other elements of Federal jurisdiction entertain an ancillary suit or proceeding

respecting property which is in the custody or control of the Court. The following are cited as supporting authorities:

Alexander v. Hillman, 296 U.S. 222, 80 L.Ed. 192, 56 S.Ct. 204;

Central Union Trust Co. v. Anderson County, 268 U.S. 93, 69 L.Ed. 862, 45 S.Ct. 427;

Hoffman v. McClelland, 264 U.S. 552, 68 L.Ed. 845, 44 S.Ct. 407;

Oklahoma v. Texas, 258 U.S. 574, 66 L.Ed. 771, 42 S.Ct. 406;

Rouse v. Letcher, 156 U.S. 47, 39 L.Ed. 341, 15 S.Ct. 236;

Wallace v. Fiske, 8 Cir., 80 F. 2d 897, 101 A.L.R. 726.

The subject is treated in an annotation in 134 A.L.R. 339.

In such case, it was held in *Central Union Trust Co. v. Anderson County*, supra, (296 U.S. 222), and *Hoffman v. McClelland*, supra, (264 U.S. 552), third persons claiming interests in or liens upon the property may be permitted to come into that Court for the purpose of setting up, protecting, and enforcing their claims, although the Court could not consider or adjudicate their claims if it did not have custody of the property. See also, *White v. Ewing*, 159 U.S. 36, 40 L.Ed. 67, 15 S.Ct. 1018. In the *Hoffman* case the Court said the power to deal with such claims is incident to the jurisdiction acquired in the main action and may be invoked by way of intervention in which case the proceeding is purely ancillary.

And it is noteworthy that the rule that jurisdiction of Federal Court over the main action will sustain jurisdiction of an ancillary or supplemental proceeding is frequently applied to proceedings on judgments and decrees. Consult *Dugas v. American Surety Co.*, 300 U.S. 414, 81 L.Ed. 720, 57 S.Ct. 515; *Local Loan Co. v. Hunt*, 292 U.S. 185, 45 L.Ed. 1230, 54 S.Ct. 695, 93 A.L.R. 195; *New Orleans v. Fisher*, 180 U.S. 185, 45 L.Ed. 485, 21 S.Ct. 347. Illustrative of this is *Johnson v. Christian*, 125 U.S. 642, 31 L.Ed. 820, 8 S.Ct. 989, an action to prevent enforcement of the judgment or decree, and *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 198 U.S. 188, 49 L.Ed. 1008, 25 S.Ct. 629, an action to determine whether or not the Court had jurisdiction to render it.

In the case of the *United States v. C. M. Lane Lifeboat Co., Inc.*, 25 F.Supp. 410, intervention of an individual as an interested party defendant was granted pursuant to Rule 24, on the ground that although a judgment would not directly bind him, it would in the last analysis do so indirectly.

In the case of *Root Refining Co. v. Universal Oil Products Co.*, 3 Cir. (1948), 169 F. 2d 514, a motion to intervene was made in a proceeding to vacate judgments of the Court of Appeals on the ground of fraud and in granting the application the Court applied the principles underlying the Federal Rules of Civil Procedure which regulate intervention in the District Courts. There the Court stated:

“This court is entitled to whatever assistance is available to it in its effort to unearth the truth and it is of no moment that Whitman’s

application may not have been promptly presented after it was informed as to the facts, since, as pointed out in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 332 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250, the matter does not merely concern private parties and issues of great moment to the public are at stake.”

It is to be remembered that the intervention in the instant action was sought on the ground, among others, that the judgment and judicial sale set up and relied upon by the plaintiffs Fisher as a basis for their claim of title and ownership to the property as to which they sought quiet title and relief from a federal tax lien was null and void, on the face of the judgment-roll and record in the action in which it was rendered, for lack of jurisdiction of the Court of the property which was the subject matter of the action and to render the particular judgment decreeing specific performance of a contract for the sale of real property and personal property for a lump sum. Specific performance and foreclosure of vendor's lien does not lie under such a contract. Consult *Welch v. Farmers L. & T. Co.*, 165 F. 561 at 567 where the rule in such cases is stated. The California rule, in its statement, is not different from that there stated. Cf. *Laske v. Lampasona*, 89 Cal. App. 2d 284 at 285, 200 P. 2d 87; *Anderson v. Permenter*, 78 Cal. App. 2d 378, 177 P. 2d 818; *Wehen v. Lundgaard*, 41 Cal. App. 2d 610, 107 P. 2d 491. “The doctrine of vendor's lien applies only to sales of real estate.” *Wabash, St. L. etc. R. Co. v. Hamm*, 114 U.S. 587, 29 L.Ed. 235, 5 S.Ct. 1081. The subject is exhaustively discussed

with copious citation of authorities in an annotation in 88 A.L.R. 92.

But this is not all. The record shows that the Court lacked jurisdiction and power to deal with the subject matter of the action in which the judgment pleaded was procured. At the time that action was commenced by John W. Fisher and Lurene W. Fisher, who were the plaintiffs therein, and the parties plaintiff in the instant action, an action in equity had been commenced and was then pending and undetermined in the same Court wherein Charles Tesseyman was plaintiff and the said plaintiffs (Fisher) were defendants, and the Court had acquired exclusive jurisdiction and control of the same real and personal property and transaction in escrow with respect thereto, as was sought to be made the subject matter of the subsequent action, and both Fisher and his wife had been served with a copy of summons and complaint in the prior action so that the Court had acquired jurisdiction not only of the subject matter therein but of the person of said Fisher and of his wife.⁴

⁴It appears from the printed record herein, at page 45, and in the appendix to this brief that the appellant, Tesseyman, as a defendant in the subsequent action, in his answer filed therein, and as a separate and distinct defense thereto, pleaded the pendency of his prior action in equity wherein he set forth and alleged facts showing that the subsequent action was brought upon and with respect to the same real and personal property and transaction in escrow mentioned in the complaint in his prior action (which also appears in the printed record herein, at pages 30-43 as part of appellant's proposed answer in the instant case), and that Fisher and his wife had been served with copy of summons and complaint therein and also, that the "court in said action can do complete justice between the parties and settle and dispose of the rights, claims, equities and priorities, if any, and give effect to their contracts legally made".

It may not be amiss to here again point out that the plaintiffs' counsel, in his affidavit by which he attempted to join issue with some of the allegations of the appellant's proposed answer in the instant case, concedes that the Court in the Tesseyman action "acquired complete and exclusive jurisdiction" of the "real and personal property" and of "any and all rights and interests" which were claimed by the plaintiffs (Fisher) in the subsequent action commenced by them in the same Court, with respect to the same property and asserted claims and rights in relation thereto under the same transaction and escrow which was the subject matter of the prior action commenced by Tessyman, and in which Fisher and his wife were defendants.

It can readily be seen that the pleading tendered by appellant with his motion stated a good cross-claim and defenses which posed problems of substantive law, to be heard on the merits and such as could not be disregarded or disposed of upon a hearing of the motion for intervention.

We maintain and submit that under the authorities and the record circumstances and facts in the present case, with the circumstances surrounding it, and for the reasons herein stated and made to appear, the intervention sought was one of absolute right under the rules and decisions. For the same reasons it was ancillary to the main action. So much for this matter. We leave it with this comment: Whatever the question raised, it is not one of fact but of law.

POINT THREE. THERE ARE COMMON QUESTIONS OF LAW AND FACT IN THE MAIN ACTION AND IN THE PROPOSED INTERVENTION, THE GRANTING OF WHICH WOULD HAVE NEITHER UNDULY DELAYED NOR PREJUDICED THE ADJUDICATION OF RIGHTS OF THE ORIGINAL PARTIES, AND THE DISTRICT COURT IN THE PROPER EXERCISE OF ITS DISCRETION, AND DUTY, SHOULD HAVE PERMITTED THE INTERVENTION SOUGHT UNDER RULE 24(b), AND FIRMLY ROOTED PRINCIPLES OF EQUITY.

Having considered the appellant's motion for intervention from the standpoint of his right to intervene as matter of right, we turn to the question raised by the motion, i.e., should appellant have been permitted to intervene under the provisions of Rule 24(b)? Incident to this is the question whether the District Court abused its discretion in denying permissive intervention.

Rule 24(b) concerns itself with permissive intervention, and provides among other things that upon timely application anyone may intervene when the applicant's claim or defense and the main action have a question of law or fact in common. And, it further provides that in exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As has already been shown, appellant in his motion alleged and stated, as a ground for intervention, and as provided for by Rule 24(b)(2), that his defense to plaintiffs' claim and alleged cause for equitable relief, presents both questions of law and of fact in common with the main action. "In construing this section of the Rule", it is said in *Kind v. Markham*

(D.C. N.Y.), 7 F.R.D. 265, at page 266, “the courts have treated it as contemplating a situation in which the intervener, even though asserting a claim or defense common in law or fact to the main action, presents a claim in addition to the main suit.”

While something more than trial convenience is here involved, there is no requirement that appellant have a direct interest in the litigation. In *Securities and Exchange Comm. v. U. S. Realty & Imp. Co.*, 310 U.S. 434, at page 459, 84 L.Ed. 1293, 60 S.Ct. 1044, at page 1055, the Court in speaking of Rule 24(b)(2), said:

“This provision plainly dispenses with any requirement that the intervener shall have a direct personal or pecuniary interest in the subject of the litigation.”

Here the allegations of the proposed answer accompanying the motion raised new issues and appellant's presence in the case in view of those allegations and the relief asked for, would not have caused any substantial delay, and at the same time would aid the Court in determining the ultimate issue in the case at the threshold of which is the primary and fundamental issue whether the Fishers, as plaintiffs, have come into a Federal Court seeking equitable relief with “unclean hands”, and there is no showing of any prejudice. The allegations of the proposed answer challenging the plaintiffs' right to equitable relief owing to their unclean hands are proper defenses. *Folberth Auto Specialty Co. v. Trico Prod. Corp.* (D.C. N.Y.), 10 F. 2d 365. And it has been held in effect that a pleading

such as the answer proposed to be filed in the District Court, and praying for relief against a judgment and judicial sale, states a proper case for relief in equity. See *Shelton v. Tiffin*, 6 How. (U.S.) 163, 12 L.Ed. 387. And in *Byers v. Surget*, 19 How. (U.S.) 303, 15 L.Ed. 670, the Supreme Court said that a court of equity may take cognizance of any fraudulent conduct of the parties in obtaining the judgment, or in attempting to avail themselves thereof. See also *Marshall v. Holmes*, 141 U.S. 589, 35 L.Ed. 870, 12 S.Ct. 62.

In other words, in the instant case appellant was not merely attempting to reassert precisely the same defense that was being asserted by the defendant United States as tax lien claimant against but additional and independent defenses such as have their foundation deeply rooted in equity jurisprudence, and although it was inevitable that some delay, however short, would be occasioned by appellant's cross-claims and defenses, nevertheless when such delay is considered along with the fact that appellant's intervention would materially add to the defense against plaintiffs' claims and unmask and expose to equitable scrutiny the insidious devices, no less evil than wicked, by which the judgment was procured under which they claim and pretend to be the owners of the property in litigation, and the further fact of equal if not greater significance, appellant's intervention would have aided in protecting the integrity of the Court under the "clean hands" doctrine.

The "clean hands" rule is the most important rule affecting the administration of justice, and is invoked on grounds of public policy and for the protection of the Court. It is contrary to equity that a party should be permitted to enjoy unmolested that particular property, the possession of which he sought to secure, and did secure, by his wrongful acts (*Angle v. Chicago, St. P. M. & O. R. Co.*, 151 U.S. 1, 38 L.Ed. 55, 14 S.Ct. 240), and any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient for the invocation of this maxim. (*Precision Instrument Mfg. Co. v. Automotive M. Mach. Co.*, 324 U.S. 806, 89 L.Ed. 1381, 65 S.Ct. 993.) The doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith, which presupposes a refusal on its part to be an abettor of inequity (*Precision Instrument Mfg. Co. v. Automotive M. Mach. Co.*, supra; and in an equitable action it is the duty of a court of equity, upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard (*DeGarmo v. Goldman*, 19 Cal. 2d 755, 123 P. 2d 1). To the same effect are *General Theatres v. Metro-Goldwyn-Mayer Dist. Corp.*, 9 F.Supp. 546, and *Bell & Howell v. Bliss*, 262 F. 131. In the *General Theatres* case it is said that at whatever stage of the proceedings it is disclosed, the Court will of its own motion apply the maxim that he who

comes into equity must come with clean hands. And in the *Bell & Howell* case it is said that the Court will do so because of interest to the public. So in *Colonial Book Co. v. Oxford Book Co.*, 2 Cir., 135 F.2d 463, aff'g 45 F.Supp. 551, the Court said the maxim should be applied for the advancement of right and justice.

Permissive intervention, of course, rests within the sound discretion of the District Court under Rule 24(b) to make whatever disposition of the application is just in the light of the facts of the particular case. Discretion does not mean caprice. A right measured by a capriciously regulated yardstick would present a false measure of equitable right.

Here there is something more than trial convenience involved. It is doubtful that there would have been any substantial or material delay, and there is absolutely no showing of prejudice that would result by the intervention. Here the unconscionable acts of the plaintiffs have immediate and necessary relation to the equity that they seek and in some measure affect the equitable relief sought by them in respect of property brought before the court for adjudication as to the ownership thereof.

Under such circumstances appellant insists, and submits, there was an abuse of discretion in denying him leave to intervene as a party defendant. There exists a question of law and fact common alike to the principal action and to the proposed cross-claim and defenses, and the proposed answer presents a claim and defense in addition to the main action.

It is therefore respectfully submitted that the order of the District Court of the United States for the Southern District of California, Central Division, from which the appeal herein was taken, for the reasons and errors herein specified and shown, should be reversed, and the cause remanded with such directions as this Court may deem the nature and exigencies of the case to require.

Dated, San Francisco, California,
December 13, 1954.

HENRY J. KLEEFISCH,
Attorney for Appellant.

(NOTE): Since the appeal herein was taken the defendant United States of America has appealed to this Court of Appeals from the judgment of the District Court entered in the original action in favor of the plaintiffs John W. Fisher and Lurene W. Fisher and against the said defendant. It is the opinion of the appellant's counsel that the two appeals present questions of law and of fact common to both of them and in the interest of justice should be heard and determined together.

(Appendix Follows.)

Appendix.



Appendix

[Title of District Court and Cause.]

(R. 21-55.)

INTERVENER'S ANSWER

First Defense.

1. Intervener admits the allegations stated in paragraphs numbered 1, 2, 4, and 5 of the plaintiffs' complaint herein; denies the allegations in paragraph numbered 3, and denied the allegations in paragraph numbered 7 insofar as they assert that the United States of America is estopped from asserting any right or claim it has or might have under the Internal Revenue laws and regulations and its tax liens against this intervener, Charles Tesseyman, either severally or jointly with Elaine Tesseyman, his wife.

2. Intervener admits that an income tax lien in favor of the defendant United States of America and against this intervener for \$31,037.54 and against Elaine Tesseyman for \$21,568.43 was filed in the office of the Recorder for the county of San Luis Obispo, State of California, on April 27, 1950, as in paragraph 6 of plaintiffs' complaint alleged, and this intervener further answers the allegations and matter set forth in said paragraph 6 as follows:

(a) He denies that on March 23, 1949, or thereabouts the plaintiffs herein, John W. Fisher and Lurene W. Fisher, or either of them, agreed to sell to the Nash Building Company, Inc., a corporation,

the real property or the personal property described in paragraph 3 of their complaint herein, and alleges and says that on and prior to the 17th day of February, 1949, the said plaintiffs were the owners only of a three-fourths interest in said property, and Cleo S. Clinton and Loretta I. Clinton were the owners of the other one-fourth interest in said property, and all of them had made and executed and deposited with the Title Insurance and Trust Company, at its office in the city of San Luis Obispo, a deed to said real property to said Nash Building Company, Inc., together with a bill of sale to the said personal property, and the said Nash Building Company, Inc., had made and executed with a title company a deed to said real property to this intervener, Charles Tesseymen, together with a bill of sale to said personal property, for the purpose and object of inducing and inveigling this intervener to make and execute, and to deliver, to said Nash Building Company, Inc., the title papers necessary to transfer to it and by which he did transfer and convey to it the title and ownership of certain real property and personal property situate in the city and county of San Francisco, state of California, of the fair and reasonable market value of \$165,000, and which was subject only to an encumbrance of \$56,000.00;

Thereafter, and on or about the 23rd day of March, 1949, and after the property so obtained from this intervener had been disposed of by and through the said Nash Building Company, Inc., a form or manner of agreement purporting to be an agreement of

sale and purchase between the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, as the apparent sellers, and the Nash Building Company, Inc., as apparent buyer, was made up and prepared by said Title Insurance and Trust Company and was signed by the said parties thereto; that said alleged agreement consists entirely of escrow instructions and was so made up and prepared by said title company at the special instance and sole direction of George H. Jovick, the president and one of the only two stockholders of the said Nash Building Company, Inc.; that said alleged agreement contemplated the sale and purchase of said real property and personal property including stock-in-trade for a lump sum and at all times was and is such that it could not be specifically enforced nor made the basis of an action for foreclosure of a vendors' lien for the unpaid purchase price of land, in equity, for the reason stated herein that it undertakes and contemplates the sale and purchase, and on its face shows itself to be a contract in form for the sale and purchase, of real property and personal property including stock-in-trade, for a lump sum of \$147,500.00.

(b) Intervener admits that on April 11, 1949, said alleged agreement of sale and purchase was amended and he alleges that Cleo S. Clinton and Loretta I. Clinton then were fully paid for their one-fourth interest in and to said property and they were so paid by and with moneys obtained by said Nash Building Company, Inc., and the plaintiffs herein from the sale and disposition of the property obtained from this

intervener as hereinbefore set forth and alleged, and thereupon the said Clintons ceased to have any rights or interest in the real property involved in this litigation, or under the said alleged agreement and escrow. He admits that on and under date of April 21, 1950, an action was commenced in the superior court of the state of California, in and for the county of San Luis Obispo, by plaintiffs herein, John W. Fisher and Lurene W. Fisher, as alleged and purported sole owners of the property involved in this litigation, and against the Nash Building Company, Inc., and George H. Jovick and this intervener, and that they caused a notice of the pendency of said action to be recorded as in their complaint herein alleged; and this intervener alleges and says that said action was one in equity for the specific performance of aforesaid alleged agreement of sale and purchase of both real property and personal property including stock-in-trade for a lump sum as aforesaid, and was and is numbered No. 17,800 upon the records of said superior court. He denies that by reason of any fact, and that by reason of any condition, and that by reason of the facts and conditions set forth in the plaintiffs' complaint herein, they had any cause of action or any ground for invoking the aid of a court of equity in said action No. 17,800, or upon which the equitable jurisdiction of the court could or did attach; that prior to and at the time of the commencement of said action No. 17,800 this intervener had commenced and there was then pending in said superior court an action, in equity, to determine rights, claims and in-

terests in and to said real property and said personal property asserted by the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Company, Inc., and the latter's two stockholders, George H. Jovick and Leonard R. Jacobson, adverse to this intervenor, and to compel the delivery by them to him of the title papers to said real and personal property that said action was commenced by this intervenor on March 10, 1950, and was and is numbered No. 17,745 upon the records of said superior court and concurrently with the commencement of said action he caused a notice of pendency of said action, its nature, purpose and object, to be recorded in the office of the Recorder for the County of San Luis Obispo, State of California; a copy of the complaint in said prior action No. 17,745 is attached hereto, marked Exhibit A, and made a part of this answer; that in and by said action No. 17,745 the said superior court acquired complete and exclusive jurisdiction of the said real property and personal property and of any and all rights and interests claimed by the plaintiffs in the subsequent action No. 17,800 and herein with respect to said property; that prior to the commencement of the latter action by them they had been served with a copy of the summons and complaint in said prior action and thereafter appeared and submitted their alleged claims to the court in said action.

Intervenor further alleges and says that he appeared and filed an answer in said action No. 17,800 wherein he denied all the rights and equities under-

taken to be set up and claimed by the said John W. Fisher and Lurene W. Fisher, the plaintiffs therein, and he specifically alleged and pleaded by way of defense that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of the complaint in said action and the exhibits attached thereto, to exist as to either the said real or personal property, the only agreement in respect of which specific performance was thereby sought being the alleged escrow agreement hereinbefore described, purportedly for the sale and purchase of real property and personal property including stock-in-trade, for a lump sum; and, also, the commencement and pendency of the said prior action No. 17,745 a copy of said answer is attached hereto, marked Exhibit B, and made a part of this answer.

(c) Intervener admits that on or about the 22nd day of December, 1950, the said came on to be heard in said superior court upon the issues joined by the complaint and answer of this intervener, the Nash Building Company, Inc., and George H. Jovick not having appeared and filed any pleading and their default for failure so to do was entered, and a form and manner of trial was had in said cause, the trial judge permitting this intervener to introduce in evidence the record and files of the court in said prior action, but denying him the right to establish any right or claim to said real and personal property that would tend to defeat the plaintiffs' claim and informing this intervener that he could do that in his

own action then pending in said court and on its calendar for trial;

That at the time of the trial of said action No. 17,800 and at the time of the rendering and entry of judgment therein, and for a long time prior thereto, Courtney L. Moore, the attorney of record for the plaintiffs herein, at all of said times was and still is an attorney at law for the said Nash Building Company, Inc., and its president George H. Jovick, and although he permitted a default to be entered against them in said action as hereinbefore stated, he appeared purportedly as the attorney for said defaulting parties on the trial and asked for and was granted leave to participate in the proceedings and soon undertook the prosecution of the action in the plaintiffs' behalf in cooperation, collusion, and association with A. V. Muller who appeared as their nominal attorney, and at the close of the trial made and prepared the findings of fact and conclusions of law which he presented to and had the trial judge sign as his decision in said cause, and this intervener is informed and verily believes and therefore alleges and charges that said action No. 17,800 was instituted by the plaintiffs herein by and through their collusion, connivance, confederation and conspiracy with the said Nash Building Company, Inc., and its president George H. Jovick, as part of a plan and scheme conceived by the said Courtney L. Moore and A. V. Muller, to cast the said Nash Building Company, Inc., in judgment upon the aforesaid alleged agreement of sale and purchase, for the purpose and object cheat-

ing and defrauding this intervener out of his rights, estate, interest and claim in and to said real property and said personal property and calculated to cut off and eliminate the income tax liens against said rights, estate, interest and claim of this intervener and taxpayer and of his wife Elaine in and to said property. He denies that any, and he denies that all, the circumstances alleged in said paragraph 6 in said complaint herein, vested the plaintiffs with the title to said property or any title or right sufficient in law or in equity to appear and ask for any relief herein.

Second Defense.

The complaint fails to state a claim or right of action against the defendant United States of America upon which relief can be granted.

Third Defense.

The plaintiffs John W. Fisher and Lurene W. Fisher in seeking equitable remedy and relief herein did not come into equity with clean hands; the Nash Building Company, Inc., was at all times material to their action No. 17,800 in the superior court set forth and alleged in their complaint herein, subservient to them, and its president, George H. Jovick, and the acts of said corporation, and the participation of said corporation in the acts, transactions, and litigation, in the plaintiffs' complaint herein and in this answer set forth and alleged, ought in fairness and good conscience to be deemed to be the acts and participation of said plaintiffs, John W. Fisher and Lurene W.

Fisher, and their attorney Courtney L. Moore, equity looking beyond the mere form that characterizes the procedure.

Fourth Defense.

Said alleged judgment of the superior court of the state of California in and for the county of San Luis Obispo, so procured and made and entered in said action No. 17,800 as aforesaid, and all proceedings and rights, predicated thereon, were and are null and void, on the face of such judgment, and the judgment roll in said action, for lack of jurisdiction of the subject matter, and from the want of power to grant relief contained in the judgment.

Wherefore, this intervening defendant having fully answered to the complaint, denies that the plaintiffs are entitled to the relief demanded, or any part thereof, and he prays that the judgment in the action No. 17,800 above described be declared, adjudged and decreed to be null and void, and for other proper relief.

H. J. Kleefisch,
Attorney for Intervener.

Duly verified.

EXHIBIT "A"

In the Superior Court of the State of California in
and for the County of San Luis Obispo

No. 17745

Charles Tesseyman,

Plaintiff,

vs.

John W. Fisher, Lurene W. Fisher,
Cleo S. Clinton, Loretta I. Clinton,
George H. Jovick, Leonard R. Jacobson,
Nash Building Co., Inc., California Pacific Title Insurance Company, and Title Insurance and Trust Company,

Defendants.

COMPLAINT

(Declaratory Relief, etc.)

Plaintiff complains of the defendants and for cause of action alleges, that:

1. At all times herein mentioned the defendants John W. Fisher and Lurene W. Fisher were and now are husband and wife and plaintiff is informed and believes and upon such information and belief alleges that at all times herein mentioned the defendants Cleo S. Clinton and Loretta I. Clinton were and now are husband and wife.

2. At all times herein mentioned each of the defendants California Pacific Title Insurance Company,

Title Insurance and Trust Company, and Nash Building Co., was, and now is, a domestic corporation, incorporated under the laws of the state of California.

3. During all of the time and times herein mentioned the defendants George H. Jovick and Leonard R. Jacobson have been, and at all the various times where they or the said George H. Jovick are or as hereinafter mentioned were, and still are, jointly and cooperatively conducting and transacting business and real estate operations and exchanges by and through the agency and instrumentality, and in and under the name, of Nash Building Co., Inc., one of the defendants herein.

As now and during all of said time and times they have always controlled and named, and they, said George H. Jovick and Leonard R. Jacobson, do now control and name, by and through the ownership and control of all or substantially all of the issued shares of stock of said Nash Building Co., Inc., the directors and officers of said company, and the said defendants have always been and now are in full possession, control and dominion of the affairs, business and property or whatever it may be of said defendant company, as plaintiff is informed and believes and therefore alleges, and have conducted, operated and controlled the same, as now, agreeable to their own interests, their own conveniences, their own resolves, and their own advantages and gains.

4. On February 10, 1949, the plaintiff was, and for a long time prior thereto had been, the owner and in possession of certain real property situate in the city

and county of San Francisco, state of California, described as:

Beginning on the Southerly line of Eddy Street at a point distant thereon 137 feet and 6 inches from the Westerly line of Mason Street; running thence Westerly along the Southerly line of Eddy Street 55 feet; thence at a right angle Southerly 137 feet and 6 inches; thence at a right angle Northerly 137 feet and 6 inches to the point of beginning;

with the building and improvements thereon consisting of a hotel building containing about 120 rooms, together with the furniture, furnishings, fixtures and equipment located and contained in or about said hotel building and premises, which said real and personal property then was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness amounting to \$65,000.00, and which property was and is known as the "Dunloe Hotel" and is hereinafter sometimes referred to as the "Dunloe Hotel property."

5. The defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton were, on the 10th day of February, 1949, and for a long time prior thereto, the owners and in possession of certain real property located on 101 Highway and situate partly within and partly outside the city of San Luis Obispo, county of San Luis Obispo, state of California, and hereafter described; together with the buildings and improvements thereon and the furniture, fixtures and equipment located and con-

tained in or about said buildings and premises, which said property was and is known as "Motel Inn" and is hereinafter sometimes referred to as the "Motel Inn property." On said 10th day of February, 1949, the said Motel Inn property was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness in the principal sum of \$46,032.01 with interest thereon at the rate of five (5%) per cent per annum.

6. On and prior to the 10th day of February, 1949, the defendant George H. Jovick had suggested and proposed to plaintiff that plaintiff trade and exchange his said Dunloe Hotel property hereinabove described, subject to the aforesaid deed of trust and chattel mortgage indebtedness against said property in the amount of \$56,000, for the said Motel Inn property hereinabove mentioned and hereinafter described, subject to the aforesaid deed of trust and chattel mortgage indebtedness against said last mentioned property in the amount of \$46,032.01, together with the on-sale general liquor license issued by the State Board of Equalization of the State of California for the sale and dispensing of alcoholic beverages on said premises, and said George H. Jovick had informed plaintiff that such exchange and trade could be made, on said terms, provided that the exchange and trade could be made, on said terms, provided that the exchange and trade be carried out and consummated by the plaintiff and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton making and executing, and depositing in es-

crow, the necessary instruments to transfer and convey to the defendant Nash Building Co., Inc., as an intermediate title holder, transferee, grantee, or "dummy," the title to their respective property involved, except the said liquor license, which was to be directly transferred to plaintiff, because the said defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton so insisted, directed and required; and, that, the plaintiff had notified the said George H. Jovick that he would make and consummate, and was ready to make and consummate, said exchange and trade of properties, on said terms and in said manner.

7. Pursuant to the terms and conditions of the aforesaid oral arrangements and understandings, for the exchange of said Dunloe Hotel property for said Motel Inn property, the plaintiff executed and acknowledged before a notary public, a deed and a bill of sale wherein the defendant Nash Building Co., Inc., was and is named as the grantee and vendee, respectively, and describing and conveying the title to said Dunloe Hotel property and, on the 10th day of February, 1949, deposited said deed and bill of sale in escrow with the defendant California Pacific Title Insurance Company; thereupon and prior to the 17th day of February, 1949, the defendants George H. Jovick and Leonard R. Jacobson, under and in the name of the defendant Nash Building Co., Inc., and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, executed and acknowledged before a notary public the necessary

deeds and bills of sale to transfer, convey and vest the title to the aforesaid Motel Inn property and deposited said deeds and bills of sale in escrow with the defendants California Pacific Title Insurance Company and Title Insurance and Trust Company for delivery to plaintiff.

8. On February 17th, 1949, and while the aforesaid deed and bill of sale deposited by plaintiff in escrow with the defendant California Pacific Title Insurance Company, transferring and conveying the title to said Dunloe Hotel property as hereinbefore stated, were held by said defendant title company in escrow, the defendants George H. Jovick and California Pacific Title Insurance Company notified plaintiff and represented to him that it was absolutely necessary, if plaintiff desired to complete said exchange of properties and escrow, that plaintiff forthwith authorize and direct the defendant California Pacific Title Insurance Company, in writing, to deliver or record the said deed and bill of sale, and that if the plaintiff's end of said exchange, transaction and escrow was not immediately completed, and the said deed and bill of sale delivered or recorded, the instruments transferring and conveying the title of the aforesaid Motel Inn property to plaintiff, which has been deposited with and then were held in escrow to complete the exchange transaction hereinbefore mentioned, would be withdrawn from said escrow.

9. Thereupon the plaintiff, on said 17th day of February, 1949, authorized and directed the defendant California Pacific Title Insurance Company, in

writing, to deliver or record the said deed and bill of sale deposited by plaintiff in escrow with said defendant; that said written authorization was prepared by the defendants George H. Jovick and said title company and was signed by plaintiff at their instance, request and direction, and under the circumstances and by reason of the representations made by them as to the withdrawal of escrow instruments and the imperative necessity for said authorization as in paragraph 8 of this complaint set forth and alleged.

10. (a) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendant California Pacific Title Insurance Company on the 23rd day of February, 1949, caused said deed from plaintiff to said Nash Building Co., Inc., to be recorded in Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco.

(b) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendants George H. Jovick and Leonard R. Jacobson, under and in the name of the Nash Building Co., Inc., and as the president and secretary, respectively, of said defendant company, on and prior to said 23rd day of February, 1949, had made, executed and acknowledged before a notary public, and deposited with the defendant California Pacific Title Insurance Company, and on said day the said defendant title company caused to be recorded in Book 5128 of Official Records, at page 440, a deed transferring and conveying

to one Charles Brown, a widower, the title to the same real property described in and transferred and conveyed by the aforesaid deed from the plaintiff to the defendant Nash Building Co., Inc., recorded in said Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco, and hereinabove mentioned and referred to; that prior to the recordation of said deeds the furniture, furnishings and equipment located and contained in or about the said Dunloe Hotel and described in and covered by the aforesaid bill of sale from plaintiff to the defendant Nash Building Co., Inc., were sold by and through the defendants George H. Jovick and Leonard R. Jacobson to three individuals, namely, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser.

(c) All the consideration for the aforesaid sale, transfer, conveyance and disposition of said Dunloe Hotel property to said Charles Brown, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser, and all the proceeds derived, accruing and resulting therefrom, including a certain promissory note in the principal sum of \$14,104.19, made, executed and delivered by the said Louis Rosenberg, Rose Rosenberg and Mary Triebwasser to the Nash Building Co., Inc., and secured by a chattel mortgage covering the furniture, furnishings and equipment of said Dunloe Hotel, were received and retained by the defendants including the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton; said consideration and proceeds amounted in the aggregate to upwards of \$140,000.00 as plaintiff is informed

and believes and therefore alleges, and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton receiving a substantial part thereof including the said promissory note and chattel mortgage.

11. Plaintiff alleges that by reason of the foregoing facts and circumstances, and of the terms and conditions of said exchange and trade of properties, given over and delivered or caused to be delivered all property and consideration stipulated and agreed to be given and delivered by him in exchange for said Motel Inn property and the plaintiff thereby became entitled and ever since the 23rd day of February, 1949, has been and now is entitled to receive from the defendants the necessary and proper instruments to transfer and convey the title of said Motel Inn property to him.

12. The real property which was to be transferred and conveyed to plaintiff, under the terms and in accordance with the conditions of said real estate transaction and escrow, in exchange for said Dunloe Hotel property which has been transferred, conveyed, sold and disposed of, as hereinbefore stated, is all that part of the West half of the Northwest quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, partly within and partly outside the city of San Luis Obispo, county of San Luis Obispo, state of California, and described as:

(Here follows legal description of Motel Inn property.)

13. Under and in accordance with the terms and conditions of said real estate transaction and escrow, and with the knowledge and consent of the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, the plaintiff entered into possession of said Motel Inn property, and the said defendants transferred or caused to be transferred to him the general on sale liquor license issued by the State Board of Equalization of the State of California for the sale of alcoholic beverages at said premises, and plaintiff ever since the 25th day of March, 1949, has been and now is in the actual possession and entitled to the possession of said Motel Inn property, as owner thereof, thus giving actual notice to the entire world that this plaintiff possessed and occupied the same.

14. Subsequently the plaintiff paid to the Bank of America National Trust and Savings Association, at its branch in the city of San Luis Obispo, the holder of the aforesaid deed of trust and chattel mortgage indebtedness against and upon said Motel Inn property, interest which became due thereon, to wit, \$1,317.02 and, in addition thereto, \$1,682.98 on account of the principal of said indebtedness; and in all other respects the plaintiff has exercised and enjoyed all rights and incidents of ownership of the said Motel Inn property, and each and every part thereof.

15. All of said defendants above named claim some right, title or interest in or to said Motel Inn property above mentioned and described, adverse to this plaintiff and his ownership of said property, both

real and personal, but plaintiff alleges that none of said defendants have any right, title or interest in or to said real and personal property or to any part thereof either in law or in equity except as subject to the plaintiff's first and superior right and estate therein, and as his trustee and agent.

16. The claims to said Motel Inn property so made by the defendants cloud the title of plaintiff thereto, and tend to depreciate the market value thereof, and tend to depreciate the market value thereof, and prevent plaintiff from handling said Motel Inn property and premises in the manner most to his interests as owner thereof.

17. The defendants California Pacific Title Insurance Company, Title Insurance and Trust Company, Nash Building Co., Inc., George H. Jovick and Leonard R. Jacobson have in their possession or under their control the conveyances to transfer and vest the title and evidence of ownership to said Motel Inn property in this plaintiff, in accordance with the terms and conditions of the aforesaid real estate exchange transaction, but said defendants have failed and refused and still refuse to deliver such conveyances and evidences of ownership to this plaintiff and, contrary to the terms and conditions of said real estate exchange transaction which has been fully performed and completed so far as this plaintiff and his property was involved therein, as hereinbefore stated, the said defendants are attempting to compel this plaintiff to pay a sum of money which he did not agree to pay and in no way is obligated to pay, as a

condition prerequisite for the delivery of such conveyances and evidence of ownership to him.

18. By reason of the premises, and of the foregoing claims, acts and refusals of the defendants to complete the real estate transaction and deliver the said conveyances and evidences of ownership to plaintiff, the plaintiff has sustained damage in the sum of \$50,000.00.

19. Plaintiff is ever ready and willing to do equity and to carry out his agreements and discharge his just obligations, and upon order of court, to pay into court the amount that may be found due to any of the defendants from this plaintiff, for escrow and title insurance charges or otherwise.

Wherefore, plaintiff prays judgment as follows:

1. That the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, George H. Jovick, Leonard R. Jacobson and Nash Building Co., Inc., to be adjudged and decreed to hold their said interest and record title to said Motel Inn property, situate in the county of San Luis Obispo, this state, as trustees for and in trust for this plaintiff, and that the said defendants be adjudged and decreed to deed or cause to be deeded and conveyed to the plaintiff Charles Tesseyman the said property subject to a deed of trust and chattel mortgage indebtedness not exceeding \$46,032.19;

2. That the defendants be directed and required to deliver to plaintiff a good and sufficient deed and bill of sale of said real and personal property, and that they pay to plaintiff the sum of \$50,000.00 as

and for damage plaintiff has sustained because they did not deliver such deed and bill of sale to this plaintiff when the same should have been delivered; and that in the event of their neglect or failure so to do within a time to be fixed by the court, then that the clerk thereof, acting in the capacity of a commissioner or master in chancery, be appointed, authorized and directed by the court to make, execute and deliver said deed and bill of sale of said real and personal property to plaintiff;

3. That the court take cognizance of all matters set forth in this complaint and of all the rights and equities therein concerned and adjust the same; that the defendants and each of them be required to make answer to this complaint and set forth the nature of their respective rights, claims and demands if any they have, that their rights, titles and equities, if any be found, and all adverse claims of each of said parties, be determined and adjudged subordinate and inferior to the rights and title of the plaintiff;

4. That the title of the plaintiff to said Motel Inn property, both real and personal, be quieted as against all of the said defendants, that plaintiff have judgment against the defendants jointly and severally for the sum of \$50,000.00 and for his costs and for such other and further relief as equity and the exigencies of the case may require and which may be just.

/s/ Henry J. Kleefisch,
Attorney for Plaintiff.

(verification)

[Endorsed]: Filed March 10, 1950.

EXHIBIT "B"

[Title of Court and Cause.]

Answer

of Defendant Charles Tesseyman.

The defendant Charles Tesseyman makes his answer and answers to the complaint herein as follows:

2. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph numbered III of said complaint, but said defendant denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part thereof, exclusive of the excepted liquor license, is subordinate or subject to any of the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim whatsoever of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

3. Said defendant denies, specifically and generally, conjunctively and disjunctively, each and every allegation in the complaint, not herein admitted, controverted or specifically denied, except that the allegations in paragraph numbered XI as to escrow instruc-

tions are admitted. And this defendant here and now adopts as part of his answer in this behalf the complaint filed by him in this court in an action in equity relating to the real and personal property involved in and sought to be affected by the present action, and wherein this defendant is plaintiff and the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Co., Inc., George H. Jovick, their associates and privies, are defendants, and which complaint and action in equity is numbered 17745 upon the records of this court, and copies of which complaint in said action, which was pending at the time of the commencement of the present action, have been served upon the said John W. Fisher and Lurene W. Fisher, the plaintiffs herein, and the said Nash Building Co., Inc., George H. Jovick and others, insofar as the allegations in the complaint in said action No. 17745 are applicable to the defense of this answering defendant.

For a second, separate and distinct defense to the said complaint herein:

3. Defendant alleges that at the time of the commencement of this action, there was and is now pending in this court an action in equity brought by this defendant against the plaintiffs Jack W. Fisher and Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, who are mentioned in the said plaintiffs' complaint herein and under whom they claim an interest in and to the real and personal property involved, and also the Nash Building Co., Inc., and George H. Jovick, their associates and privies, upon

and with respect to the same real and personal property and transaction and escrow mentioned and described in the complaint herein, which action is numbered 17745 upon the records of this court and is still undetermined; that the said Jack W. Fisher and Lurene W. Fisher have been served with copy of summons and complaint in said action, and this court in said equity action can do complete justice between the parties and settle and dispose of the rights, claims, equities and priorities, if any, and give effect to their contracts legally made.

4. At the time of the commencement of said action numbered 17745, on the 10th day of March, 1950, this defendant caused a notice of the pendency of said action to be recorded in the office of the Recorder for the County of San Luis Obispo, State of California, and said notice, of which a copy is attached to this answer, marked Exhibit A, and made a part hereof, was recorded in Volume 555 of Official Records, at page 201, in the office of said county recorder. That, as appears by and from the complaint in said action and as this defendant alleges the fact to be, all the matters and things involved in this action are involved in the said former action.

For a third, separate and distinct defense to the said complaint herein:

5. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph III of said complaint, but said defendant

denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part of or either thereof, exclusive of the excepted liquor license, is subordinate or subject to the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim, if any, of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

6. Said defendant denies each and every allegation and statement contained in the paragraph numbered V of said complaint, and further answering the allegations and matter undertaken to be set forth in said paragraph, this defendant alleges and says that they are contrary to and are in contradiction and variance of the terms, provisions, conditions and stipulations set forth and contained in the "Escrow Instructions," attached to said complaint as Exhibit A thereto, subscribed by the plaintiffs herein.

7. Said defendant admits that the written escrow instructions attached to said complaint as Exhibits A and B thereto, were placed with the Title Insurance and Trust Company, at its branch in the city of San Luis Obispo, State of California, under its escrow number 41209, but he denies that said escrow instructions were given or so placed by the parties

thereto, or any of them, under or pursuant to the alleged agreement of sale of said real and personal property or any part thereof, as in paragraph VII of said complaint alleged.

8. Said defendant denies that Cleo S. Clinton and Loretta I. Clinton or either of them have conveyed or transferred or assigned their right or title or interest in and to the alleged or supposed agreement of sale, or to the property alleged to be covered thereby, or to any or all benefits, accrued or to accrue, from said escrow number 41209, to the plaintiffs John W. Fisher and Lurene W. Fisher, or either of them. He denies that ever since the date, if any, of the alleged transfer and assignment, the said plaintiffs have been or still are the owners, or either of them has been or still is the owner, of the said real and personal property, subject to the alleged agreement of sale. And further answering, in this behalf, this defendant alleges and says, that the said Cleo S. Clinton and Loretta I. Clinton have been and were fully paid for any and all rights, interests, estates, titles and benefits that they or either of them, at the time of said escrow, had in or to said real property and said personal property, and that they were so paid through said escrow and with funds and monies deposited and paid into said escrow by the defendants Nash Building Co., Inc., and George H. Jovick and others, for the benefit of this defendant, and therefore the said Cleo S. Clinton and Loretta I. Clinton had nothing to transfer or convey or assign to the plaintiff herein and said plaintiffs are not before this court with clean hands.

9. Said defendant answers the allegations and matters set forth in paragraph X of said complaint, as follows: He denies that possession of the Motel Inn, with or without fixtures, or the stock-in-trade, or the personal property therein located or therewith connected, was delivered to the defendant Nash Building Co., Inc., or its designated agent, if any, and he denies that they or either of them, at the time of the commencement of this action were or was in possession of said property. He denies that the cash sum of \$61,840.94 has been delivered through said escrow to said plaintiffs, and alleges and says that the said sum was paid to the said plaintiffs, and the said Cleo S. Clinton and Loretta I. Clinton, and from which sum the said Cleo S. Clinton and Loretta I. Clinton have been fully paid for their right, title and interest in and to said property, as hereinbefore stated. Defendant admits all the other allegations and statements in said paragraph X contained.

10. Defendant denies each and every allegation in the complaint, not herein admitted, controverted or specifically denied, and in particular denies the precise amounts of money stated, and any lesser amounts. For a fourth, separate and distinct defense to said complaint herein:

11. Said defendant alleges that the terms, provisions and conditions of the escrow instructions mentioned and referred to in said complaint, in all material matters and respects, including time and manner of performance by the alleged vendee, have been waived by the acts, conduct and doings of the vendor

parties thereto, including the plaintiffs herein, and the said plaintiffs are, and each of them is, estopped to assert any claim or right to specific performance, or any right or claim in respect to or affecting the said property, real or personal, under or through said escrow instructions, and in particular the said personal property because, if it is true, which is denied, that the stipulated and agreed sale and purchase price for said personal property was and is \$37,500.00 then the plaintiffs and Cleo S. Clinton and Loretta I. Clinton, as the former joint owners and vendors thereof, by plaintiffs' own admission and showing in their complaint; and otherwise, have been paid and they have received through the escrow alleged in said complaint, the full amount due and payable to them for said personal property, under and pursuant to such alleged agreement of sale.

Wherefore, defendant denies that the plaintiffs are entitled to the relief prayed for in the complaint, or any part thereof, or to any other relief whatsoever against this defendant, and prays that the complaint be dismissed as to him with costs assessed against the plaintiffs, and for such other and further relief as may be just and proper.

/s/ H. J. Kleefisch,
 Attorney for Defendant,
 Charles Tesseymen.

(Verification.)

Exhibit A

In the Superior Court of the State of California,
in and for the County of San Luis Obispo
No. 17745

Charles Tesseyman,

Plaintiff,

vs.

John W. Fisher, Lurene W. Fisher,
Cleo S. Clinton, Loretta I. Clinton,
George H. Jovick, Leonard R. Jacobson,
Nash Building Co., Inc., California Pacific Title Insurance Company, and Title Insurance and Trust Company,

Defendants.

NOTICE OF PENDENCY OF ACTION

To Whom It May Concern:

Take Notice that an action has been commenced in the above-entitled Court, by the above-named plaintiff, against the above-named defendants, which action is now pending; that the general object of said action is for a declaration and determination that the plaintiff is the owner, in possession and entitled to the possession of the real property and premises in the complaint in said action, and hereinafter, described, and to determine all and every claim, estate or interest therein asserted by said defendants, or either or any of them, adverse to the said plaintiff, and for other and general relief.

The real property and premises involved in, and to be affected by said action is all that part of the West Half of the Northwest Quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, and partly within and without the City of San Luis Obispo, in the County of San Luis Obispo, State of California, particularly described as follows:

“Beginning at a point on the North boundary line of the City of San Luis Obispo, as said line is defined in the Charter of said City, approved by the Legislature of the State of California, by Resolution adopted Feb. 23, 1911, distant thereon 1506.5 feet West from the Northeast corner of said City and also 16.8 feet East from a stone monument 4"x14"x10" set in said boundary line, and running thence North $12^{\circ} 16'$ West, 22 feet to an iron stake set in the southerly line of the California State Highway; thence along said line on the following courses and distances, by a right curve of 430 feet radius, 73.2 feet to a concrete monument set for Sta. 1+55.7 of the official survey of said highway; thence North $68^{\circ} 14'$ East 236.6 feet to a concrete monument; thence by a right curve of 220 feet radius 99.6 feet to a concrete monument; thence South $85^{\circ} 46'$ East 119.5 feet to a concrete monument; thence by a left curve of 330 feet radius 296.6 feet to a concrete monument; thence North $42^{\circ} 52'$ East 44 feet to a stake; thence leaving said line of said highway and running South $0^{\circ} 13'$ East 234 feet to a stake on the Northerly bank of the San Luis Obispo Creek; thence along said bank South $51^{\circ} 34'$

West 106.2 feet; South $86^{\circ} 39'$ West 200 feet; South $78^{\circ} 43'$ West 192 feet; South $39^{\circ} 22'$ West 130.8 feet to an iron stake; thence leaving said creek bank and running North $12^{\circ} 16'$ West 333 feet to the point of beginning.

“Saving and excepting therefrom that portion thereof conveyed to the State of California for highway purposes by deed dated January 21, 1946, and recorded in Book 402 of Official Records at page 437, records of said County, described as follows:

“All that part of the portion of the West one-half of the Northwest quarter of Section 25, Township 30 South, Range 12 East, Mount Diablo Base and Meridian, conveyed to George H. Jovick by deed dated March 7, 1944, and recorded in Book 358 of Official Records at page 465, records of said County, which lies North of the following described line:

“Beginning at a point on the Northerly boundary line of the City of San Luis Obispo as said line is defined in the charter of the said City, approved by the Legislature of the State of California by Resolution adopted February 23, 1911, distant along said Northerly boundary line, Westerly 18.75 feet from the stone monument described in the above-mentioned deed as having dimensions $4'' \times 14'' \times 10''$; thence (1) from a tangent which bears North $50^{\circ} 59'$ East, along a curve to the right, with a radius of 370 feet, through an angle of $17^{\circ} 15'$ for a distance of 111.40 feet, the Northeasterly 73.2 feet last-described course being a portion of the Northerly boundary line of the parcel of land conveyed in the above-mentioned deed; thence,

continuing along said Northerly boundary line, (2) North $68^{\circ} 14'$ East 236.60 feet; thence continuing along last said boundary line (3) along a curve to the right tangent to last-described course, with a radius of 220 feet, through an angle of $0^{\circ} 39' 13''$ for a distance of 2.51 feet; thence leaving said boundary line (4) South $88^{\circ} 55'$ East, 169.36 feet; thence (5) North $85^{\circ} 03' 50''$ East, 343.45 feet to a point on or near the Easterly boundary line of the parcel of land described in the above-mentioned deed distant South $20^{\circ} 03' 50''$ East, 88.59 feet from a concrete monument set at the Southwesterly terminus of the course described as 'North $42^{\circ} 52'$ E., 44 ft.,' in last said deed; thence (6) continuing North $85^{\circ} 03' 50''$ East, 100 feet."

Dated: March 6th, 1950.

H. J. Kleefisch,

Attorney for Plaintiff.

(Affidavit of service by mail.)

[Endorsed]: Filed July 26, 1950.

[Endorsed]: Filed March 17, 1954.



No. 14,413

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES TESSEYMAN,

Appellant,

VS.

JOHN W. FISHER, LURENE W. FISHER,
and UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

BRIEF FOR APPELLEES

JOHN W. FISHER AND LURENE W. FISHER.

COURTNEY L. MOORE,

1060 Mills Tower, San Francisco 4, California,

Attorney for Appellees

John W. Fisher and

Lurene W. Fisher.

FILED

FEB 17 1955

PAUL P. O'BRIEN,
CLERK

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No. 14,413

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BRIEF FOR APPELLEES

JOHN W. FISHER AND LURENE W. FISHER.

OPENING STATEMENT.

This Court can take judicial notice of the opinions rendered by the District Court of Appeal of California in *Fisher v. Nash Building Company*, 113 CA 2d 397 and *Tesseyman v. Fisher*, 113 CA 2d 404. (When reference is made to these two decisions it will be by the page number in the bound volumes of the opinions of the District Court of Appeal.)

In *Atlantic Fruit Co. v. Red Cross*, 5 Fed. Rep. 2d 218 the Circuit Court of Appeals said:

(1) That we may take cognizance without plea or proof of the judicial opinions of any state in the Union is undoubted (*Vagaszki v. Consolidation Coal Co.*, 445 F. 913, 141 C.C.A. 37), and a fortiori is this true of the opinions of United States Courts.

* * * * *

. . . We think it clear, however, that it is permissible to examine the record resulting in an opinion, to ascertain the grounds upon which the opinion is based. This does not imply acceptance as proven facts, of what the Court writing the opinion so regarded.

From these records it appears that on March 23, 1949 the Fishers, husband and wife, agreed to sell the Motel Inn to the Nash Building Co. for \$155,000. This proposed sale was evidenced by escrow instructions deposited with a title company to whom the Fishers delivered the deed and bill of sale of the personal property (page 398). Subsequently, on April 11, 1949, amended escrow instructions were filed and Tesseyman was let into possession. Tesseyman, in writing, approved both of these escrows. On March 31, 1950, approximately a year after the original escrow, the Fishers made demand on the Nash Building Co. and Tesseyman to complete the terms of the sale, by paying the balance of the purchase price, which they failed to do. Tesseyman thereupon filed the action of *Tesseyman v. Fisher*, #17745 in the State Superior Court, in which he disowned the escrow instructions and claimed an oral agreement under the

terms of which Fisher and the Nash Building Co. agreed to trade the Motel Inn for a hotel owned by Tesseyman in San Francisco. Thereafter Fisher filed action #17780 against the Nash Bulding Co. for the balance of the purchase price, joining Tesseyman, and claiming that any rights which he might have were subordinate to Fisher's rights. In the Fisher action a *les pendens* was filed. Approximately a week later the United States government filed an income tax lien for income tax owed by Tesseyman. The government never intervened in the pending litigation between the Fishers and the Nash Building Company and Tesseyman, but sat idly by. Both State Court actions went to trial, and a judgment was rendered in action #17780 in favor of the Fishers and against the Nash Building Company for the balance of the purchase price, the Court holding that any rights Tesseyman might have were subordinate to the Fishers' rights. In the Tesseyman suit #17745, to have the transaction declared a trade, the Court held that the evidence did not support such contention and rendered judgment against Tesseyman. Both cases were appealed and were affirmed in the decisions referred to, the Courts holding that Tesseyman had no right, title or interest in either the real or personal property agreed to be sold by Fisher to the Nash Building Co.

When Tesseyman in the state Court proceedings appealed he did not put up a stay bond, and Fisher caused the sheriff of San Luis Obispo County to sell this real and personal property, and bought it in for the balance of the purchase price. After a year

expired, during which redemption might be had, he secured a sheriff's deed.

It will be noted that title never passed out of the Fishers' for the deeds and bills of sale remained in escrow and were never delivered to the purchaser, for the reason that the escrow was never fulfilled. It will likewise be noted that the government's claimed lien against this real and personal property could only attach to any interest which Tesseyman might have in the property, and the State Courts held that he had no right, title or interest. Nevertheless, the government refused to release its tax lien of record, with the result that Fisher filed this action against the United States of America to quiet title against the tax lien which they were asserting against Tesseyman's interest in this property, which the state Courts had declared non-existent. It further appears from the transcript in the government's appeal that the federal district judge decided in favor of the Fishers and quieted title, and the government then appealed. The government, at the trial before Judge Tolin, called Mr. Tesseyman as a witness, and he was sworn and took the stand. It was after the government's case had been submitted and immediately prior to the decision that Tesseyman filed his intervention motion, and as stated in the footnote on page 9 of the appellant's brief, the judge stated from the bench that it was denied on the ground that the request for intervention was not made timely.

Interpreting Rule 24 of the Federal Rules of Procedure, the Court in *Kaufmann v. Society Interna-*

tionale, 188 Fed. 2d 1017 held that the intervenor must have "a legal interest in the property in the custody of the Court."

Appellant recognizes this rule for he states (Brief, p. 13):

That he sought leave to intervene "on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation . . ."

PART I.

THE QUESTION OF LACK OF JURISDICTION OF THE SUBJECT MATTER.

A judgment obtained by fraud and collusion is not null and void but merely voidable, and will be treated separately. In Part One we will confine ourselves to the claim of lack of jurisdiction of the subject matter.

A.

THE STATE COURT HAD JURISDICTION TO ENTERTAIN THE SEPARATE ACTION FILED BY FISHER (NO. 17,780) TO COLLECT THE BALANCE OF THE PURCHASE PRICE.

This subject is discussed at pages 24 and 25 of appellant's brief, but no authorities are cited. The question of whether Fisher should have been compelled to cross-complain in the prior action brought by Tesseyman, or whether he could file an independent action to recover the balance of the purchase price, raises a procedural, rather than a jurisdictional

question, and the general rule is that it is discretionary with the trial Court. The head note of Section 69 under equity found in 30 C.J.S. 422 reads:

“A chancery court may retain jurisdiction of a case of original equitable cognizance to afford legal relief; but retention for such purpose is matter of discretion rather than of right and will ordinarily be denied where the legal relief is not germane to the equities involved.”

Tesseyman made the contention in the state Court that it was mandatory that the two actions be tried together for the reason that the Court in his action (No. 17745) was a Court in equity and had exclusive jurisdiction. At page 402 the Court states his contention:

(a) . . . Tesseyman's argument appears to be that since a court of equity had obtained jurisdiction first over action 17745, and since the pleadings in that action were adopted and made a part of the pleadings in the present action, and vice versa, consolidation was a matter of right.

This claim was disposed of by the Appellate Court by holding that consolidation laid solely within the sound discretion of the trial Court and that there had been no abuse of the discretion; it thus applied the same principle as heretofore set forth in the quotation from *Corpus Juris Secundum*, the Court saying:

(b) . . . Consolidation is not a matter of right; it rests solely within the sound discretion of the trial judge, and his decision to consolidate, or his refusal to do so, will not be reviewed except upon a clear showing of abuse of discretion.

(*Realty etc. Mtg. Co. v. Superior Court*, 165 Cal. 543, 546, (132 P. 1048).) Tesseyman makes no showing of either an abuse of discretion or of prejudice resulting from the court's determination to keep the two actions separate; nor can he do so in view of the record in both actions.

(c) . . . The issues which Tesseyman endeavored to inject into the present case by his pleadings, his offer of proof, and motion to consolidate were subsequently tried in action 17745, and there determined against him, which determination has this day been affirmed by this court. Since the result would have been the same had the two actions been consolidated, he clearly suffered no prejudice.

There is no merit in Tesseyman's contention that the court erred in refusing his offers of proof. The court had determined to keep separate the issues involved in the two actions.

There is therefore, no merit in Tesseyman's claim that the Court lacked jurisdiction to entertain the Fisher action, because Tesseyman had filed a prior action.

B.

THE STATE COURT HAD JURISDICTION TO ENTERTAIN AN ACTION PRAYING FOR THE ESTABLISHMENT OF A LIEN ON BOTH REAL AND PERSONAL PROPERTY AND DECREERING A SALE OF BOTH REAL AND PERSONAL PROPERTY FOR A LUMP SUM.

Appellant's contention is found at page 23. This same issue was raised in the state Courts and decided

adversely to Tesseyman. At page 402 the Court in itemizing Tesseyman's points states that one of them appears to be that "the Court should not have decreed a lien on the personal property". The Appellate Court pointed out that the principal issue in the Fisher case was whether the plaintiffs as sellers were entitled to recover from the Nash Building Company the balance of the purchase price and (403) "whether Tesseyman's interest in the property was paramount to plaintiff's". At 403 the Court says: "He [Tesseyman] concedes that the evidence offered by him related to events which occurred prior to the escrow instructions that in no way could affect plaintiff". In other words, the Court held that the question of whether both the real and personal property were subject to the same lien and could be sold for a lump sum were issues between Fisher and the Nash Building Co. and not an issue between Fisher and a third party (Tesseyman), who claimed some rights in the property, but which rights were subordinate to Fisher's.

Because it is doubtful whether the Court can take judicial notice of the contents of the briefs which were filed in the State Court actions, we will briefly refer to the authorities cited in Fisher's brief on this same question.

Fisher pointed out that all the authorities relied on by Tesseyman (and they are the same as found on page 23 of his present brief) referred to implied vendors liens where title had passed to the vendee, and did not apply to cases where vendor retained

title to both the real and personal property as security for the purchase price. Fisher quoted at length from *Sparks v. Hess*, 15 Cal. 186, where the California Courts went extensively into this problem. Fisher also pointed out the Tesseyman quotations from 88 ALR 92, which is the same as found in the present brief, failed to note an exception to the general rule, which reads as follows:

“Where, on a combined sale of realty and personalty, no deed has been executed but title is reserved by the vendor until payment of the purchase price, it would seem that the parties must have intended to reserve the title as security not merely for such part of the purchase price as could be attributed to the realty, but for the full purchase price. At least, this seems to be the view adopted by the courts.”

Fisher also pointed out that the doctrine of this earlier ALR note was confirmed in 152 ALR 16 where the following language was used:

“Where a contract for the sale of property includes both realty and tangible personalty, the jurisdiction to grant specific performance of the contract as to the realty may carry with it the right to grant similar relief as to the personalty, at the instance of either the vendor or the vendee, even though the contract as to the personalty might not, independently, be a proper subject for such relief.”

It thus appears that the issue now raised, that is, whether the real and personal property could be sold as a unit for a lump sum, was at issue in the State

Court actions and was supported by the weight of authority, including California.

PART II.

THE CLAIM THAT THE JUDGMENT IN THE FISHER ACTION WAS OBTAINED BY FRAUD.

Fisher, relying upon the judgment which he obtained in the state Court, used it as a basis of a quiet title action against the United States of America, which was asserting an income tax lien against Tesseyman who, according to the state Courts' judgments, had no interest in this property.

Tesseyman's attempted interventions in this action between Fisher and the government is a collateral attack:

“As a general rule, an attack upon a judgment is regarded as collateral if made when the judgment is offered as the basis of the opponent's claim. This rule has been applied where the attack is made upon a judgment offered in evidence in a subsequent action or proceeding, as, for example, where the judgment is offered in support of a title, or as a foundation for the application of the doctrine of *res judicata*. (31 Am. Jur. p. 204.)”

Directly applicable to the present situation is the language found at 31 Am. Jur. page 207:

“Similarly, an attempt, in a suit to quiet title, to attack a judgment affecting the property has

been regarded as a collateral attack upon the judgment, even though the petition contained a prayer that the judgment be vacated.”

The intervention charged that the judgment in the Fisher case was obtained by collusion between Fisher and Tesseyman’s co-defendants and their counsel. 49 C.J.S. at 861 reads:

“A party or privy to a judgment ordinarily is not permitted to impeach it collaterally on the ground that it was obtained by means of collusion between the other parties to the action or the attorneys in the case, although, as considered supra Sec. 414, this may be done by a stranger to the proceeding, when his rights or interests in a subsequent litigation are threatened by the judgment.”

Since this is a collateral attack on a judgment—for the reason that Fisher offered in a proceeding against the United States Government in support of a title, and since a judgment may not be impeached collaterally by any person who is a party or privy to the judgment—the judgment is valid and not subject to collateral attack by Tesseyman.

However, in addition, assuming that it was a direct attack, the type of extrinsic fraud which permits an equitable attack upon a judgment must be that type of fraud which prevents a litigant from having his day in Court and presenting his side of the controversy.

No lengthy reference to authorities is necessary because this question is exhaustively treated in *Pico*

v. Cohn, 91 Cal. 129, and *Throckmorton v. United States*, 98 U.S. 61, where the Supreme Court of the United States defines what constitutes extrinsic fraud; 25 Law. Ed. 93 at 95:

“But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client’s interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See, Wells, *Res Adjudicata*, Sec. 499; *Pearce v. Olney*, 20 Conn., 544; *Wierich v. DeZoya*, 7 Ill., (2 Gilm.) 385; *Kent v. Ricards*, 3 Md. Ch., 396; *Smith v. Lowry*, 1 Johns. Ch., 320; *De Louis v. Meek*, 2 Green (Iowa), 55.”

It thus appears that the type of fraud which justifies an attack in equity on the validity of the judgment—is extrinsic fraud, which prevented an adversary trial.

An examination of the intervention motion and the proposed answer conclusively demonstrates that no actionable fraud could possibly exist.

The intervention motion contains a summarization of the claim of fraud—Tr. pp. 19-20:

“ . . . and, also, to have been procured by said plaintiffs through collusion and connivance with the Nash Building Company, Inc., and George H. Jovick, defendants in said state court action, and their attorney Courtney L. Moore, . . . ”

When we turn to the proposed answer for an elaboration of these charges, the answer proves that no extrinsic fraud existed which could be the basis of an attack.

Tesseyman alleges that in the Fisher action he filed an Answer (Tr. p. 26) which Answer is Exhibit B (Tr. p. 44-51). The answer thus filed in the Fisher case sets up the identical issues now being urged before this Court, namely, that it was a trade and not a sale. The Appellate Court points out that as a part of his answer in the Fisher case Tesseyman adopted “insofar as the allegations in the complaint . . . are applicable to the defense of this answering defendant”, the allegations in the earlier action (113 CA 2d 397 at 399). Tesseyman further admits and affirmatively alleges that he was present at the trial of the Fisher case, but was not permitted to introduce evidence. The record in the Appellate Court shows that he testified (113 CA 2d 400). We thus have presented a case where the defendant formally appeared and answered, set up all his defenses and took the

witness stand. In his claim of fraud he forgets that the very defenses which he urged in the Fisher trial were the subject of a hearing in the action commenced by himself (No. 17745), in which action the Court branded his evidence as without credence. It thus appears that every opportunity was given Tesseyman to present in their fullness any claims which he had, and that he did so, and that the Courts in the two hearings refused to believe his testimony. Yet, in his brief, he constantly speaks of "collusion and connivance" (p. 13), of coming into Court with "unclean hands" (p. 27), as "insidious decree, no less evil than wicked" (p. 28), and these epithets are hurled at his co-defendants and their counsel, because they took an adverse position to him in open Court, and refused to repudiate the solemn agreement which the Nash Building Company had signed. Tesseyman forgets that he sued these same co-defendants for fraud in Action No. 17745, asking damages in the sum of \$50,000 (Tr. p. 41-43). He forgets that in Action No. 17745, in which Tesseyman claimed a trade instead of a sale, and in which he sought to repudiate the escrow instructions, that that action was subsequently tried and decided adversely to him, and that the Appellate Court (113 CA 2d 405) definitely stamped the escrow agreements as valid contracts and that Tesseyman's claim to the contrary was unsupported. At 113 CA 2d 404 at 407, the Court said:

"Notwithstanding plaintiff's disregard of the rules, we have examined the record. It would serve no useful purpose to recite the many ramifications of the transactions involved. Suffice it

to say that documentary evidence bearing plaintiff's signature and the oral testimony clearly and unequivocally support the court's findings.''

If the escrow instructions honestly evidenced the true transaction, could Tesseyman's co-defendants join with him in his effort to swindle Fisher out of the balance of his purchase money by disavowing and repudiating, not only their own solemn written promises, but the signature of Tesseyman which appeared on the same document. If the escrow instructions were honest documents and clearly evidenced the transaction, was there any more honorable course which could be pursued than to admit the debt and by permitting a default to be entered in an action to which they had no legitimate or honest defense?

This is the extrinsic fraud which Tesseyman claims bestows jurisdiction on this Court to entertain this motion for intervention.

The application of the doctrine of the *Throckmorton* case has been applied to petitions for intervention under Rule 24. *Dowdy v. Hoffield*, 189 Fed. 637 is directly in point except that it involved probate orders rather than judgments. It appeared that in the Probate Court in the District of Columbia, various efforts had been made by the attempted intervener to have the will set aside on the ground of fraud and undue influence. He had a trial and an appeal, both of which were decided adversely. Nevertheless, he attempted to accomplish the same result through the medium of intervention. The Circuit Court of Appeals said:

“ . . . The Supreme Court in *United States v. Throckmorton*, 1878, 98 U.S. 61, 25 L.Ed. 93, held that the fraud must be ‘extrinsic or collateral, to the matter tried by the first Court, and not to a fraud in the matter on which the decree was rendered’. *Josserand v. Taylor*, 1946, 159 F. 2d 249, 34 C.C.P.A., Patents, 824, affirmed this rule and in that case the *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* case, 1944, 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed. 1250, was held not to have changed the law.”

“[4, 5]. The appellants in Case No. 10, 475 contend that they should have been allowed to intervene as a matter of right or at least that it was an abuse of discretion to deny them leave to intervene. The law is well settled that one entitled to intervene as a matter of right under Rule 24(a) (3), F.R.C.P. ‘must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment’. *Pure Oil Co. v. Ross*, 7 Cir., 1948, 170 F. 2d 651, 653. *Such is not the case here. The appellants’ interest in the estate was determined to be nothing in the former contest of the issues which are also presented in this case.*” (Italics ours.)

Exactly the same situation exists in the present action. Trials were had by Courts which had jurisdiction of the subject matter and the parties, and adverse decisions were rendered to the present intervenor which decisions were affirmed in written opinions by the District Court of Appeal of California. There was no extrinsic fraud which prevented an adverse trial, and as was said in the *Dowdy* case, the

appellant's interest in the estate was determined to be nothing in the former contest of the issues, which are also presented in this case. Tesseyman's (the appellant here) interest in the estate was likewise determined to be nothing in a former contest of the issues, which he again attempts to present in this case.

PART III.

THE REFUSAL OF THE UNITED STATES DISTRICT JUDGE TO ALLOW INTERVENTION WAS PROPER AND WAS NOT AN ABUSE OF DISCRETION.

The interpretation of Rule 24 of the Federal Rules of Procedure has been the subject of judicial decisions.

In *Mullins v. DeSoto Securities Co.*, 2 FRD 502, the Court in discussing Rule 24 (a), which pertains to intervention as a matter of right, it is stated that the Courts are unanimous in requiring prompt action on the part of an intervener who seeks to assert rights in a suit to which he is not a party, and that he must make timely application, and the question in each case is determined by the exercise of sound discretion by the trial Court, and in discussing Rule 24 (b) with respect to permissive intervention likewise stated it lies within the discretion of the district judge and can be reversed only for abuse.

In *In re Rumsey Mfg. Corp.*, 7 FRD 93, the Court, referring to both Rules 24 (a) and (b), says in determining whether or not the application is timely, it must

be made to appear why the application was not made within a reasonable time after the commencement of the action.

In *United National Bank of Youngstown v. Superior Steel*, 9 FRD 124, the Court said at 127, that intervention will not normally be allowed once the actual trial has begun or is about to begin.

In *Durkin v. Pet Milk*, 14 FRD 364, the Court went extensively into the question of intervention under Rule 24 and in discussing permissive intervention points out that if the intervention would materially delay or prejudice the original action it should be denied.

In *In re Willecy County Water Control and Improvement District*, 36 Fed. Sup. 36, the Court states that the permissive intervention lies in the judicial discretion of the trial Court, and that when the claim or defense departs from the field of litigation of the original parties in such a manner as to complicate or delay its determination, leave should be denied.

The District Court rendered a judgment against the government in Fisher's suit and the government appealed. There is on file in the government's appeal a reporter's transcript of the evidence. This Court can take judicial notice of the facts which appear therein. (*Booth v. Fletcher*, 101 Fed. 2d 676 f.n. at 679.) It appears from the transcript that Tesseyman was called as a witness by the government on March 1, 1954 (Tr. p. 15-23). He therefore knew on March 1, 1954 of the pendency of the litigation and

must have known some considerable time prior thereto in order to be present as a witness. On this date the testimony was closed and the matter submitted on briefs to be filed by the government and by Fisher. Tesseyman did not file his motion for intervention until the 17th day of March, 1954 and its hearing was set for March 29, 1954, at which time it was denied. It thus appears that Tesseyman's motion was made after the closing of the testimony and all that was left to be done was the filing of briefs. If Tesseyman had been permitted to intervene at this late date, it must be made to appear why the application was not made within a reasonable time after the commencement of the action, and why it was not made until after all the testimony had been taken. Furthermore, it clearly appears that if the intervention had been granted a field of litigation would have been opened up, which was foreign to the issues between Fisher and the government, and would have complicated and delayed the determination of the validity of the government's tax lien. It would have required a retrial of the cases tried in the Superior Court accompanied by voluminous testimony.

CONCLUSION.

It thus appears:

1. That the judgments of the state Courts are valid and final and are not subject to either a collateral or a direct attack on the ground of extrinsic fraud, and therefore Tesseyman had no right, estate,

interest or claim in or to the real property involved for the reason that by the State Court actions it has been adjudged that he had no interest in the property and therefore the motion for intervention was properly denied, and

2. That the motion for intervention was not timely for the reason that it was filed after the trial had begun, the taking of evidence was closed and it would have injected new issues into the trial which would depart from the field of litigation of the original parties, and the hearing of such issues would have complicated and delayed the determination of the tax lien question which was pending between Fisher and the government, with the result that the application to intervene was properly denied because it was not timely. Furthermore, the question of whether the application was timely or untimely lies in the sound discretion of the trial judge, and there is not the slightest suggestion that he in any way abused his discretion.

We respectfully submit that the action of the trial judge should be affirmed.

Dated, San Francisco, California,
February 14, 1955.

COURTNEY L. MOORE,
Attorney for Appellees
John W. Fisher and
Lurene W. Fisher.

United States
Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a cor-
poration, Appellant,

vs.

JAMES A. NITCY, Appellee.

JAMES A. NITCY, Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a cor-
poration, Appellee.

Transcript of Record

Appeals from the United States District Court for the
District of Idaho, Northern Division

FILED

SEP 8 1954

PAUL P. O'BRIEN
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No. 14421

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ern District of Idaho

No. 1914

JAMES A. NITCY.

Plaintiff,

VS.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,

Defendants.

COMPLAINT

Now comes the plaintiff and for cause of action alleges:

I.

That this action arises under the act of Title 45, USCA, Section 51 to 60 and Title 45, USCA, Section 1 to 23; more than \$3000.00 is in controversy.

II.

During all times herein mentioned, the defendant was a Wisconsin corporation, not licensed to do business in the State of Idaho or having appointed a statutory agent in the State of Idaho and owned and operated in interstate commerce, a railroad running through the City of St. Maries, County of Benewah, State of Idaho.

III.

That in connection with the railroad at said point, the said defendant maintained and operated a round-house and that engines and cars, operating in interstate commerce, were serviced and repaired at said round-house; that the plaintiff was employed as a laborer in said round-house and worked

in and about engines and cars that were used in interstate commerce; that at all times hereinafter mentioned, the said plaintiff was so engaged.

IV.

That on or about February 10, 1950, the defendant, through its agent, Nels Stromberg, required the plaintiff to transport a fifty gallon drum of oil on a two-wheel hand truck; that said plaintiff was pulling said hand truck and Harry Bogardus was pushing said hand truck; that said oil was to be used for cleaning engines operated in interstate commerce; that Harry Bogardus was pushing said car or dolly with the said drum of oil in an up right position; that the said fellow servant, Harry Bogardus negligently pushed the said drum of oil to a horizontal position upon the ground near a platform upon which the drum was to be loaded, making it necessary for plaintiff to lift the drum to an up right position; that the said drum was dropped into sand; that in lifting said drum to an up right position for the purpose of loading the same upon said platform, the said plaintiff seriously strained his back; that the said defendant by and through its agents was negligent in the following respects:

1. In failing to keep said drum in an up right position.
2. In maintaining a soft surface from which to lift drum upright.
3. In failing to provide a solid footing near said platform.

V.

The facts stated in Paragraph IV hereof are

hereby realleged as though the same were set out herein in full; that the said defendant failed to provide proper tools and failed to comply with its own safety rules as follows:

1. Failed to provide proper equipment or any equipment for lifting drums of oil on to said platform.

2. In failing to make a report of the accident as required of the foreman by that certain rule book entitled, "Safety Rules for Employees in the locomotive, car and store departments", printed and published by defendant and distributed to its employees.

3. In failing to provide proper medical attention for the said plaintiff.

VI.

That Nels Stromberg was the foreman in and about the said round house owned and operated by said defendant and he was their duly authorized agent in overseeing and directing work in and about said round house; it was the usual custom of Nels Stromberg to require the defendant's employees to do and carry on work for which they were not qualified; that the plaintiff was employed as a laborer and was not classified or qualified to carry on work other than work of a laborer; that on or about October 13, 1950, and while plaintiff was still under treatment by defendant's doctor, Doctor Repp of St. Maries, Idaho, and was being treated for his back injured as aforesaid herein, the said defendant by and through its foreman and agent,

Nels Stromberg, required the plaintiff to do and carry on boilermaker helper's work; that while so engaged, the said plaintiff was negligently instructed by defendant's boilermaker, Harold Hartman, to mount a narrow ledge upon a steam locomotive that was being used in interstate commerce; that said ledge was very narrow and very high from the ground; that said plaintiff was required to tighten bolts on said locomotive; that while tightening said bolts, the said plaintiff seriously strained, wrenched and dislocated his back; that said defendant by and through its agents was negligent as follows:

1. In instructing the plaintiff to mount said narrow ledge and place him in a perilous position.

2. In requiring the plaintiff to do strenuous work where it was necessary for him to assume an awkward pose, thus causing a condition whereby plaintiff was injured as aforesaid.

3. In requiring the said plaintiff to do strenuous work in an awkward pose while the plaintiff was under treatment by defendant's Doctor.

4. Requiring plaintiff to do work for which the said plaintiff was not qualified.

5. Requiring plaintiff to do boilermaker helper's work.

VII.

The facts stated in Paragraph VI are hereby realleged as though the same were set out herein in full; that the said defendant failed to provide proper equipment for working on steam engines and failed to observe safety rules as follows:

1. Failing to provide equipment, whereby plaintiff would not be placed in a perilous position.

2. Instructing plaintiff to do work without proper equipment.

3. Failing to maintain proper safety standards by reason of which, plaintiff was injured.

4. In failing to make a report of the accident as required of the foreman, Nels Stromberg, by that certain rule book entitled, "Safety Rules for Employees, in the locomotive, car and store departments" printed and published by defendant and distributed to its employees.

5. In failing to provide proper medical attention to said plaintiff.

VIII.

That prior to said injury, the said plaintiff was a strong and able-bodied man, capable of and actually earning the sum of \$230.00 per month; that because of these injuries, the said plaintiff has been made incapable of any gainful activity since October 8, 1951, has suffered great physical and mental pain and has incurred expenses in the amount of \$250.00 for medicine and medical attention. That said plaintiff has been damaged in the sum of \$50,000.00 for pain, suffering and loss of employment and earnings.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$50,250.00 and costs.

/s/ ROBERT V. GLASBY,
Attorney for Plaintiff

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STRIKE

Comes Now the defendant and moves against the plaintiff's complaint, as follows:

I.

To dismiss the complaint against the defendant because it does not state facts sufficient to constitute a cause of action or claim upon which relief can be granted.

II.

If the foregoing motion to dismiss be denied, the defendant moves the court that so much of paragraph I of plaintiff's complaint stating that said action arises under the act of Title 45, U.S.C.A., Secs. 1 to 23, be stricken, because and for the reason that there are no facts alleged in said complaint which would make the aforementioned sections applicable in this proceeding.

/s/ B. E. LUTTERMAN,
CHAS. F. HANSON,
MORELL E. SHARP,
/s/ ELDER & ELDER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed February 27, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

April 27, 1953

This cause came regularly on this date, in open Court, for hearing on defendants Motion to Dismiss and Strike. Robert Glasby appearing for the plaintiff and Robert H. Elder and Morell Sharp, appearing for the defendant.

After a general discussion between the Court and Counsel, the Court ordered the Motions submitted on brief, the defendant to have 10 days from this date to file his opening brief, the plaintiff the 10 days following to reply and the defendant 5 days following to reply to the reply brief.

[Title of District Court and Cause.]

ORDER

This matter is before the court upon the Defendant's Motion to Strike and Motion to Dismiss. Briefs have been submitted by respective counsel and the same duly considered by the Court. It is the opinion of the Court that the Motions should be denied, the Court reserving the right to rule upon the Motion to Strike at the time the same is heard upon its merits.

Now, Therefore, It Is Hereby Ordered that the

Motion to Dismiss, or in the Alternative, Motion to Strike be and the same hereby are Denied.

Dated October 6, 1953.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed October 7, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and answering the complaint of the plaintiff admits, denies and alleges as follows:

I.

Answering paragraph I, the defendant admits that the jurisdiction of this court is invoked under Title 45, U.S.C.A., Section 51 to 60, but denies the applicability of Title 45, U.S.C.A., Section 1 to 23.

II.

Answering paragraph II, the defendant admits that it is a Wisconsin corporation operating in interstate commerce with a railroad running through the City of St. Maries, County of Benewah, State of Idaho, but denies each and every other allegation therein contained.

III.

Answering paragraph III, the defendant admits the same.

IV.

Answering paragraph IV, the defendant denies each and every allegation therein contained.

V.

Answering paragraph V, the defendant denies each and every allegation therein contained.

VI.

Answering paragraph VI, the defendant admits that at the time and place alleged in plaintiff's complaint Nels Stromberg was foreman in and about said roundhouse and acted as said defendant's authorized agent in performance of his duties as foreman, but further answering said paragraph, the defendant denies each and every other allegation therein contained.

VII.

Answering paragraph VII, the defendant denies each and every allegation therein contained.

VIII.

Answering paragraph VIII, the defendant denies each and every allegation therein contained, and particularly denies that plaintiff was injured in the sum of \$230.00 per month, or in any sum or sums whatsoever for loss of earnings, or that plaintiff was damaged in the sum of \$250.00, or in any sum or sums whatsoever for medical attention, or that plaintiff has been damaged in the sum of \$50,000.00, or in any sum or sums whatsoever for pain and suffering and loss of earnings, as in said paragraph alleged,

or otherwise, or at all, on account of any act, omission or negligence of the defendant.

Affirmative Defense

Further answering said complaint, and for an Affirmative Defense, the defendant alleges that if the plaintiff was injured or damaged as in said complaint alleged, or otherwise, or at all, such injuries or damages were not caused by any act, omission or negligence of the defendant, but were proximately caused by the negligence and carelessness of the plaintiff himself, and particularly the defendant alleges that the plaintiff was guilty of contributory negligence.

Wherefore, having fully answered, the defendant prays that the above entitled action be dismissed with prejudice and that it do have and recover judgment against the plaintiff for its costs and disbursements.

B. E. LUTTERMAN,
CHAS. F. HANSON,
/s/ MORELL E. SHARP,
ELDER & ELDER,
/s/ By ROBT. ELDER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

October 26, 1953

This cause came on for trial before the Court and a jury, Robert W. Glasby appearing for the plaintiff, and Robert Elder for the defendant. Upon motion of Robert Elder, Morell Sharp was admitted as associate counsel for the defendant.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mrs. Bill Zanetti and Neil V. Cooper, whose names were so drawn, were excused for cause; Charles W. Lehti, Mrs. Ira A. Robson and Howard E. Elford, whose names were also drawn, were excused on the plaintiff's peremptory challenge; and Mildred Peterson, whose name was likewise drawn, was excused on the defendant's peremptory challenge.

Following are the names of the person whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to-wit:

James Orville Shields, L. R. Miesen, Jr., Clayton R. Smith, Elva B. Beach, James C. Ashton, Arthur F. Shields, Vera E. Garber, Jean E. Goldstein, Arthur L. Earin, Pete Hay, Edward Haugen, Arthur R. Klautdt.

The Court directed that one juror, in addition to

the panel, be called to sit as an alternate juror. Thereupon the name of Lilian Riep was drawn from the jury box, and on being sworn and examined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiff's cause by his counsel, James A. Nitey, H. Don Mosley, H. C. Hartman, Bernard M. Sorenson, Mrs. Leona Nitey, Bergen A. Rapp, Thomas Moutray, Herbert Marquart and Robert E. Granville were sworn and examined as witnesses, and other evidence was introduced, on the part of the plaintiff.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Tuesday, October 27, 1953, and continued the trial to that time.

[Title of District Court and Cause.]

MINUTE ORDER

October 27, 1953

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.

It was stipulated by and between counsel for respective parties that if Dr. Richard C. Miller was present he would testify that from review of the

plaintiff's record of September, 1949 there was no evidence of anything wrong with his spine at that time and that there was no charge for this information.

Here plaintiff rests.

Plaintiff having rested, comes now the defendant and renews his motion to strike and dismiss. The Court being advised, ordered paragraphs 5, 6 and 7, and 2 and 3 of paragraph 4 of the complaint stricken. The motion to dismiss was overruled without prejudice.

Harry Bogardis, Dr. F. E. Miller and Dr. James F. DaPree were sworn and examined as witnesses on the part of the defendant, and other evidence was introduced, and here defendant rests and both sides close.

Comes now the defendant and renews its motion to dismiss. The same ruling by the Court.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate juror, and the jury panel retired in charge of a bailiff, duly sworn, to consider of their verdict. While the jury was still out, the Marshal was directed to provide them with supper at the expense of the United States.

On the same day the jury returned into court, counsel for the respective parties being present, whereupon, the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

Verdict

“We, the jury in the above entitled cause, find for the plaintiff, and against the defendant, and assess damages against the defendant in the sum of \$12,870.

Pete Hay, Foreman.”

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

Comes now the defendant and informs the Court that it intends to file a motion for judgment notwithstanding the verdict or in the alternative a motion for new trial, and a motion for a reduction in the verdict.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find for the plaintiff, and against the defendant, and assess damages against the defendant in the sum of \$12,870.

/s/ PETE HAY, Foreman.

[Endorsed]: Filed October 27, 1953.

In the United District Court for the District of
Idaho, Northern Division

No. 1914

JAMES A. NITCY, Plaintiff,
vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury, both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of \$12,870.00,

It is hereby ordered, adjudged and decreed that plaintiff recover of defendant the sum of \$12,-870.00, with interest at the rate of 6% per annum, and his costs of action, and that the plaintiff have execution therefor.

Dated this 27th day of October, 1953.

[Seal] /s/ ED. M. BRYAN, Clerk

[Endorsed]: Filed October 27, 1953.

[Title of District Court and Cause.]

**MOTION FOR JUDGMENT IN ACCORDANCE
WITH MOTION FOR DIRECTED VER-
DICT OR FOR NEW TRIAL**

Comes now the defendant and moves the Court to set aside the verdict of the jury and to enter judgment in favor of the defendant in accordance with its motion for directed verdict because the plaintiff's evidence was insufficient in law, or if the foregoing motion be denied, to set aside the verdict and the judgment entered thereon and grant defendant a new trial for the following reasons:

1. The verdict is contrary to the clear weight of the evidence.

2. There is insufficient evidence upon which to support a verdict for the plaintiff.

3. The verdict and the excessive damages assessed show that the verdict was the result of sympathy, passion, and prejudice rather than upon the evidence introduced and the instructions of the court.

4. The trial was unfair generally to the moving party and resulted in a miscarriage of justice.

/s/ MORELL E. SHARP,

Attorney for Defendant

ELDER & ELDER,

/s/ By ROBT. ELDER,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed October 29, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

November 4, 1953

Defendant having requested a transcript before arguing their Motion, the Court thereupon ordered argument submitted on brief, defendant to have 30 days after receiving transcript to file opening brief, plaintiff 30 days following to answer and defendant 20 days to reply.

[Title of District Court and Cause.]

MINUTE ORDER

March 19, 1954

Upon motion of counsel for the defendant and there being no objection by the plaintiff, defendant was given up to and including April 1, 1954, in which to file its opening brief on motion for judgment in accordance with the motion for directed verdict or for a new trial.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO STRIKE AND
BRIEF IN OPPOSITION TO DEFEND-
ANTS MOTION FOR DIRECTING VER-
DICT OR NEW TRIAL

Now comes plaintiff and moves the Court to strike defendant's motion for directed verdict or new trial on the grounds that said motion is in-

sufficient to be considered by the Court as this motion for directed verdict does not state the specific grounds upon which the defendant relies in accordance with Rule 50, Federal Rules of Civil Procedure; that the motion for new trial is insufficient in that it fails to specify the particulars wherein the evidence is considered to be insufficient in accordance with Rule 50 of "Rules of Practice of the United States District Court of the District of Idaho".

Plaintiff further moves that said defendant's motion be declared null and void ab initio and that the order staying execution be dissolved and that execution issue in pursuance to the judgment for plaintiff entered herein.

Argument in Support of Plaintiff's Motion To Strike

The conflict of authority on the Court's right to consider a general motion for a directed verdict pointed out in *New York Life Insurance Company vs. Doerhsen*, 75 Federal 2d 96, was settled by Rule 50, Federal Rules of Civil Procedure, *Virginia-Caroline Tie & Wood Company vs. Dunbar*, 106 Federal 2d, 383, See also, 2 *Barron & Holtzoff* 756 and 3 West Federal Form 631; *Atlantic Greyhound Corporation vs. McDonald*, 125 F2 849.

Defendant's motion in regard to new trial was supported by brief only as to Points 1 and 2. Points 3 and 4 were not urged.

Points 1 and 2 are practically the same thing and will fall within the provisions of Rule 50 of "Rules

of Practice of the United States District Court of the District of Idaho" which states:

"If a ground be insufficiency of the evidence, the petition shall specify the particular wherein the evidence is considered to be insufficient. If the petition does not contain the above mentioned specifications, the unspecified grounds will be disregarded."

It can not be seriously contended that defendant's brief can be considered a portion of the motion attacked in view of the prohibition of Rule 6 of Federal Rules of Civil Procedure requiring motions for directed verdict and new trial to be filed within ten days after judgment filed. Judgment in this instant case was the 27th day of October, 1953, Atlantic Greyhound Corp. vs. McDonald, *supra*.

Defendant's motion could not be helped by oral statement of any kind, made during the trial since the transcript reveals no oral statement specifying grounds upon which the motion for directed verdict is based. The defendant was the party ordering the transcript to be prepared, it can not now complain that arguments stating grounds, if any, were not incorporated in the record.

Alternative Argument

While plaintiff takes the position that the motion to strike defendant's motion should be sufficient to dispose of all matters and controversies, he feels that it is necessary to refute the merits, if any, of defendant's brief in support of defendant's motion.

Plaintiff feels that it is unfortunate that it is necessary to restate the facts of this case but in

view of the distortion of the facts placed in defendant's brief, it is necessary that the most glaring distortions be pointed out and refuted. While plaintiff contends that it is not necessary to complain prior to undertaking a task with hidden dangers, there is ample evidence of complaint when the danger was discovered. The evidence shows (tr. 8) that plaintiff cried out for help and that plaintiff said he had hurt his back on said barrel. See also Tr. 33. The uncontradicted evidence shows that Bogardis was supervising the work and that he nevertheless, ordered plaintiff to lift the barrel, (tr. 8).

Plaintiff's testimony was not contradicted as Bogardis stated he did not recall whether or not, he had been assisted by plaintiff in putting up the barrel of wash oil, (tr. 122-128).

There was ample evidence for the jury to find plaintiff was injured and that the railroad doctor, Doctor Rapp knew of the injury. Said Doctor's testimony shows that he treated plaintiff for an injured back on February 14, 1950.

Q. Do you know for what purpose the x-ray was taken?

A. Well, he saw me in February for this same matter, for the back pain. (Tr. 88)

Q. What did he say was the matter with his back?

A. That it just came on while he was working. (Tr. 92)

If the testimony of the railroad doctor, Doctor

Rapp, would be considered to attain the dignity of conflicting testimony, the jury has the right to decide what is correct.

Defendant had the audacity to state as a fact the contents of a self-serving note regarding a purported injury before the barrel episode. This note was definitely proven not to have been written by the plaintiff by plaintiff's uncontradicted testimony, (tr. 31).

The Vice-Principal, Harry Bogardis, was aware of the danger in lifting the barrel as he attempted to lift the same himself (tr. 6), nevertheless, he ordered the plaintiff to lift the barrel (tr. 8).

Points and Authorities

I.

Failure to warn of dangers known to supervisor constitutes negligence and a person acting under orders has a right to assume he is reasonably safe. *Meigs vs. Porter, et al.*, 126 Pac. 411.

II.

A man is not required to quit his job rather than to do something dangerous. *Blair vs. Baltimore & Ohio Railroad Co.*, 89 L.Ed. 490.

III.

An employee has the right to assume that he may act according to orders of the foreman and may rely on their advise. *Leonides vs. Great Northern Railroad Co.*, 72 Pac. 2d, 1007, 83 L.Ed. 3.

IV.

“When a thing which causes injury is shown to be under the exclusive control of the defendant and the injury is such as in the ordinary course of things does not occur, if the one having such control uses proper care, it affords reasonable evidence in the absence of an explanation, that the injury arose from the defendants want of care,” *San Juan Light and Transit vs. Requeaa*, 56 L.Ed. 680, cited with approval in *Jesionowski vs. Boston and Main Railroad*, 91 L.Ed. 416.

V.

It is incumbent upon the party against whom a jury has found a verdict to make a stronger showing to support a directed verdict in cases arising under Federal Employers Liability Act than in other negligence cases. *Urie vs. Thompson*, 93 L.Ed. 1282 11 ALR 2d 52.

Defendants brief is largely complaining about matters which the jury found to be facts which defendant claims were not supported. The defense that the Jury determined questions contrary to the instructions given by the Court is not open to the defendant in that they have not contended as a ground for their motion that the Jury determined questions contrary to the instructions. The doctrine in which the law is deeply steeped, is that the Judge will not disturb the verdict where the Jury has determined issues in favor of one party where reasonable men could have differed in determining the facts under the evidence. In this case the evidence

was overwhelming in favor of the plaintiff and against the defendant.

Respectfully submitted,

/s/ ROBERT V. GLASBY

Acknowledgment of Service attached.

[Endorsed]: Filed April 27, 1954.

[Title of District Court and Cause.]

MINUTE ORDER

May 14, 1954

This cause came on regularly this date in open court to be heard on motion for Judgment N.O.V. and motion for new trial, Robert W. Glasby appearing as counsel for plaintiff, and Morell G. Sharp appearing as counsel for the defendant.

After hearing counsel, the court granted the motion for a new trial and denied the motion for Judgment N.O.V., and set the cause for trial at 10 o'clock a.m., May 20, 1954.

In the United States District Court for the District
of Idaho, Northern Division

No. 1914

JAMES A. NITCY, Plaintiff,
vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Defendant.

ORDER

Motion for Judgment in accordance with motion for directed verdict, or for New Trial, having been filed by the Defendant, and the matter having been presented by briefs and oral argument by respective counsel, and

The Court being advised, it is Ordered that the portion of the Motion requesting judgment in accordance with Motion for Directed Verdict be and the same is denied, and it is further Ordered that the motion for New Trial be and the same is hereby granted.

Dated this 14th day of May, 1954.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To James A. Nitey, plaintiff, and Robert V. Glasby,
his attorney:

You and each of you will please take notice that the above named defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment made and entered in the above entitled court and cause on the 27th day of October, 1953 in favor of the plaintiff and against the defendant in the above entitled action; and from that certain order made and entered in the above entitled court and cause on the 14th day of May, 1954 in favor of the plaintiff and against the defendant, being an order denying defendant's motion for judgment in accordance with its motion for directed verdict.

Dated this 14th day of May, 1954.

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD CO.,

/s/ By MORELL E. SHARP,
Its Attorney of Record

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, desires to give an undertaking on appeal to the Ninth Circuit Court of Appeals as provided in Rule 73 of the federal rules of civil procedure as set forth in the United States Code Annotated.

Now, Therefore, the undersigned surety, the Hartford Accident and Indemnity Co., a surety company authorized to act as surety on bonds and undertakings in the State of Idaho does hereby obligate itself to the said plaintiff under such statutory obligations in the amount of Two Hundred Fifty Dollars (\$250.00).

Dated this 14th day of May, 1954.

HARTFORD ACCIDENT AND IN- DEMNITY COMPANY

[Seal] /s/ By H. BENSON, Attorney-in-Fact
Agent at Coeur d'Alene, Idaho

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, designates the following to be contained in the record on appeal in this action:

1. The complete record and all proceedings in said action, including the transcript of evidence.
2. Notice of Appeal.
3. Undertaking on Appeal.
4. This Designation of Contents of Record on Appeal.

Dated this 20th day of May, 1954.

B. E. LUTTERMAN,
CHAS. F. HANSON,
/s/ MORELL E. SHARP
ELDER & ELDER,
/s/ ROBT. ELDER,
Attorneys for Defendant

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

ORDER

Upon the motion of the plaintiff for leave to appeal in forma pauperis without prepayment of fees and costs.

It is ordered that the motion be granted and the plaintiff may take and prosecute his appeal, without prepayment of fees and costs or the costs of a stenographic transcript or printing any part of the record, the expense of which is to be paid by the United States when authorized by the Court.

Dated this . . . day of June, 1954.

/s/ CHASE A. CLARK,
United States District Judge

It is hereby certified that the appeal on the part of the Plaintiff is not frivolous.

/s/ CHASE A. CLARK,

United States District Judge

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Elder & Elder, its attorney:

You and each of you is hereby given notice that James A. Nitey, Plaintiff above named, hereby cross-appeals to the United States Court of Appeals for the Ninth Circuit from the order granting a new trial and from orders during the progress of the trial withdrawing counts in the complaint from the consideration of the Jury; said order granting new trial was entered on May 14, 1954.

Dated this 11th day of June, 1954.

JAMES A. NITCY

/s/ By ROBT. V. GLASBY

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Summons with Return attached.
3. Motion to Dismiss, or in the alternative, Motion to Strike.
4. Minutes of the Court of April 27, 1953.
5. Motion for Enlargement of Time to file Brief.
6. Order on Ex Parte Application Enlarging Time.
7. Order Denying Motion to Dismiss, etc.
8. Answer.
9. Demand for Trial by Jury.
10. Minutes of the Court of Oct. 26, 1953.
11. Verdict.
12. Minutes of the Court of October 27, 1953.
13. Judgment.
14. Motion for Judgment in Accordance with Motion for Directed Verdict or for New Trial.
15. Notice of Taxation of Costs.
16. Minutes of the Court of Nov. 4, 1953.
17. Motion for Stay of Proceedings, etc.

18. Affidavit of Service.
19. Order Granting Stay of Proceedings, etc.
20. Minutes of the Court of March 19, 1954.
21. Plaintiff's Motion to Strike and Brief.
22. Minutes of the Court of May 14, 1954.
23. Order Granting Motion for New Trial, etc.
24. Notice of Appeal by defendant.
25. Undertaking on Appeal.
26. Designation of Contents of Record on Appeal.
27. Motion of Plaintiff to Proceed in Forma Pauperis.
28. Affidavit of plaintiff.
29. Order to appeal in Forma Pauperis.
30. Notice of appeal by plaintiff.
31. Order Extending Time for Appeal.
32. Transcript of Testimony.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 6th day of July, 1954.

[Seal]

/s/ ED. M. SMITH,
Clerk

No. 1914

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Defendant.

This cause was tried before the Honorable Chase A. Clark, United States District Judge, sitting with a jury, at Coeur d'Alene, Idaho, on Oct. 26, 1954.

Appearances: Robert W. Glasby, Coeur d'Alene, Idaho, Attorney for the Plaintiff. B. E. Lutterman, Esq., Seattle, Wash., Charles F. Hanson, Esq., Seattle, Wash., Morell E. Sharp, Esq., Seattle, Wash., Robert Elder, Esq., Coeur d'Alene, Idaho, Attorneys for the Defendant.

G. C. Vaughan, Reporter. [1*]

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Q. (By Mr. Glasby): Where do you reside, Mr. Nitey? A. St. Maries, Idaho.

* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

(Testimony of James A. Nitcy.)

Q. What are you doing now?

A. Nothing at all.

Q. Have you,—what have you done in the past?

A. You mean all of my life?

Q. Well, let us say for the past four or five or ten years?

A. I have worked for wages.

Q. What type of work have you done?

A. Labor.

Q. Have you ever done anything but labor in the line of work? A. No, sir.

Q. In your life you have done nothing but labor work? A. That is all.

Q. How much education did you have?

A. Not very much.

Q. Well, how far did you go in school?

A. Probably to the fourth grade.

Q. Have you done quite a bit of reading on your own?

A. No, I haven't, I haven't had time to do that.

Q. You are not a self educated man, are you?

A. No, sir.

Q. When did you go to work for the railroad company, that is, when you were working during the time of these injuries that you have complained about?

A. Well, that was in 1949, the last time that I went to work for them.

Q. Do you know what month that was?

A. I had a record of it but I can't remember.

Q. Was it in the fall, do you know about that?

(Testimony of James A. Nitcy.)

A. Yes, sir.

Q. And you worked for the railroad on what type of work, what were you classified to do there?

A. I was classified as a laborer.

Q. Were there other classifications there, people working in other capacities?

A. Yes, sir, lots of them.

Q. Well, can you give the background of some of those different capacities, name the different types of classifications?

A. There were laborers, firemen, stationary firemen, machinists and machinists helpers, boiler-makers and boilermaker's helpers, and, of course, there was the boss.

Q. Did these machinists who had helpers and the boilermakers who had helpers, did they have the helpers always with them?

A. Yes, they did, until the boilermaker's helper quit.

Q. So far as you know they never worked without a helper? [2] A. No.

Q. Did you ever do any of that work?

A. Yes, they used me to do that work, too.

Q. As a boilermaker's helper or as a machinist's helper? A. Both.

Q. And did you and the other laborers there have to do this work occasionally?

A. I don't know about the other laborers, but I did occasionally.

Q. Calling your attention to February of 1950

(Testimony of James A. Nitey.)

was there an incident that occurred in that month that stands out in your mind?

A. Well, I hurt my back lifting a barrel.

Q. Will you explain in detail about this barrel incident, if you please. First I will ask you how far was the barrel to be moved?

A. Well, it would be from where it was outside the roundhouse about fifty yards into the roundhouse.

Q. What were you going to do with the barrel when you got it in?

A. Well, we had to put it up to the washer.

Q. What do you mean?

A. Well, we had to put it up on a stand.

Q. How high was that?

A. I would say about two feet. [3]

Q. And were you pulling this in yourself, were you bringing that in yourself?

A. We only had thirty minutes for dinner, of course we got paid for that hour and——

Q. ——What date was this, Mr. Nitey?

A. This was the 10th of February.

Q. 1950? A. Yes, 1950.

Q. And you were pulling this barrel in during the dinner hour, is that what I understand?

A. Yes, sir.

Q. Who was at the roundhouse then?

A. Just me and Harry Bogardis, that is the fellow I was helping.

Q. You say you were helping Harry Bogardis, what position did he occupy there?

(Testimony of James A. Nitcy.)

A. He was over me, that is, he was a stationary fireman.

Q. Did you work for him on this day?

A. I did.

Q. On this particular job of moving this barrel, —that was in his charge, was it? A. Yes.

Q. Just how did you move this barrel, will you explain that?

A. Well, we had to put this barrel up to wash this engine that was set out there and as soon as we ate dinner we or rather he got this old two wheeled truck. It was [4] a big wooden truck with iron wheels.

Q. Two wheels on the truck, was there?

A. Yes.

Q. Is that sometimes called a dolly?

A. Well, I don't know, I call it a two-wheeled truck.

Q. He chose that tool, did he? A. Yes.

Mr. Sharp: We will object to that as leading, if the Court please.

The Court: Yes, it is leading, you will have to let the witness do the testifying.

Q. Who chose that?

A. He went and got the old cart, yes, he is the one that did that. Of course, it was right there where we would go out the door and there was always a rope with a hook on it that we pulled stuff around there with. I believe it was about four or five feet long and I took that and went out on the platform, the barrel was sitting on end, just

(Testimony of James A. Nitcy.)

sitting on end on this big platform, and we tipped the barrel a little and run the nose of the truck under it and then we tipped it back over on the truck and I hooked the rope on and away we went. When we got it in the roundhouse we were both kind of tired, you know, it was a kind of a hard pull up there, it was a little rough and the hard pull up to where the stand was where the barrel went. There was [5] quite a big place there, I would say eight or ten feet across where the engine's blow-cock blew the steam out and blowed water and stuff out there and it made a big hole and that was filled with sand and right there is where it was to set, and so he just wheeled up to that and dumped the barrel off. He was out of breath and so was I and so we just stood there a few minutes and rested and he was kind of vexing about having to do that kind of work because the younger men would not put this barrel up there, and he tried to lift the barrel up and didn't make it, it was down on the side in this sand.

Q. Did he try to lift this barrel up and put it on that platform?

A. Oh, no, he was trying to lift it up on its end, it was down on the side there and it had to be lifted on its end to put it on this platform. We had to get it on its end so that the platform could kind of be tipped and shoved under and we would tip the barrel over on it.

Q. Will you just explain to the jury what this platform was like?

(Testimony of James A. Nitcy.)

A. Yes, it was just like a sled about two feet high and just the length of the barrel. It was kind of an iron frame and it had two shoes on it about like that, that size (indicating) and it had a little nose about that long that you tipped it up just kind of like on a rocker and when you tipped up like that (indicating) that nose [6] would be right down on the ground and if you tipped the barrel up, oh, it wouldn't need to be very far, just about that far (indicating) and then you could run this nose right under the barrel and then you could tip the barrel up. The barrel would be standing straight up about that time and then you could tip the barrel and all right up with these rockers and you could just jerk it to where you wanted it.

Q. You had done that a number of times, had you?

A. Well, yes, I had, that is, I had helped with it.

Q. Could the barrel be put on this platform from a horizontal position on the ground?

A. What do you mean by horizontal, I don't understand.

Q. I mean laying down on the side in that sand.

A. The only way it could be done was if two men were strong enough to lift it right straight up, to lift a fifty gallon barrel full straight up I know I couldn't do it, and there was nobody around there that could, that is why they have these rockers, these rocker shoes, so that it could just be

(Testimony of James A. Nitey.)

set on end and tipped a little and then rocked right over.

Q. And the barrel had to be upright to do that?

A. Yes, and it wasn't at that time. That is where I hurt my back, lifting this barrel up on end in this sand. The sand was piled up there when the barrel cut in on its end and [7] I couldn't raise it up.

Q. When you raised it could you get away from it?

A. No, my feet was down in that sand, I had it up as high as I could and I said to Mr. Bogardis, "Help me". I couldn't get away or anything else, I was just stuck there, I had all of the load on myself there.

Q. How big a load was this?

A. It was a fifty gallon full barrel, a new barrel not opened.

Q. Did you say anything about your back being injured at that time?

A. Well, I had told Harry that I had hurt my back,—Harry Bogardis.

Q. What did you do after that?

A. Well, we finally got the barrel up and went around about our business there and when I finally say Nels,—

Q. Who was Nels?

A. —Mr. Stranberg, I told him, but he went on, he never said anything, he was a little hard of

(Testimony of James A. Nitcy.)

hearing and he didn't say anything about it, just went on.

Q. He didn't give you any instructions at that time? A. No.

Q. Who was supervising this job of lifting the barrel?

A. Well, Bogardis was, he was the one that told me that we had to put it up there to wash this engine, you can't wash [8] the grease off an engine with water, you have to have cutting oil and that was cutting oil in the barrel, you have that mixed in with steam and water.

Q. He was supervising this job of getting the barrel up, was he? A. Yes, sir.

Q. And he was present at that time, was he?

A. Certainly. He finally reached over and got hold of the top of the barrel and helped me to get it on over and put it up.

Q. When did he do that?

A. That was after I got stuck with it and said "Help me".

Q. He didn't make any effort to help you before that?

A. Only he took hold and tried to lift it himself and he couldn't do it.

Q. Could you both get on the end of that barrel and try to lift it?

A. Well, I was on one side there and on the end and I tried to lift it up. I had one hand about like this and I got it up about that high and he

(Testimony of James A. Nitey.)

reached over and got ahold of a flange, a flange about that wide (indicating).

Q. And he helped raise it up then?

A. Yes, sir.

Q. He didn't make any effort to help you with that until you complained? [9]

The Court: I know that counsel dislikes to object continually but I can see that he is getting nervous about these leading questions, so I will tell you, Mr. Glasby, you will have to let the witness testify and you can conduct this examination without so many leading questions, and now go ahead.

A. Well, that is the way it was, I could never have got the barrel up and if I had fell down the barrel would have fell on top of me, I just couldn't get away.

Q. As a laborer around there, prior to February what kind of work had you done around this roundhouse, did you do hard or light work?

A. I did everything that was to be done, light work and hard work, anything that needed to be done.

Q. Did you continue with the same type of work all the time that you were working at this roundhouse?

A. Well, yes, I was still a laborer and I did all that I could and I got hurt, and there was some lifting that I couldn't do.

Q. What was that that you couldn't do?

A. Well, lifting heavy things, I couldn't do

(Testimony of James A. Nitcy.)

that, like lifting barrels and stuff like that, and, of course, like shoveling coal I had to stop that completely.

Q. You had been shoveling coal before that time?

A. Yes, I shoveled coal in the daytime when I was firing. [10]

Q. When did you quit shoveling coal?

A. Well, I don't remember, I know I have got the date. I know I was called back east on a trip and when I came back I asked Mr. Stranberg if I could quit shoveling coal that it was too hard on my back, I said I just can't do it, and I said if you want to put another man in my place that is all right but I just can't shovel coal, and he said "Well——

Mr. Elder: I don't believe this man could testify as to what some other man said, we will object to that.

The Court: There is quite a question here as to whether anybody can be forced to do anything that they don't want to do,—I believe I will let him go ahead.

Q. How long did you work after February of 1950?

A. After February of 1950 I worked until,—well, it was in 1951, I can't remember just the date, I have it there but I can't remember it now.

Q. Between February of 1950 and the time that you quit in 1951 is there any event that stands out in your mind?

A. Yes.

(Testimony of James A. Nitcy.)

Q. What was it?

A. Well, the boilermaker asked me to help him, that was on the 13th of October, 1950, he asked me to help him clean the front end of an engine. I was ordered by Mr. Stranberg [11] to always help the boilermaker or whoever asked me around there to help him, that is to help anybody that was over me and they was all over me, and so I goes and helps him on the engine and we clean out all the sand and soot out of the front end of the engine and then, of course, we had to close up the front end which is closed up with a bunch of big burrs all around the engine door. I said to him when I shut the door,—it is on a hinge on one side and I shut the door and was going to tighten the clamp and I said to Mr. Hartman, he was the boilermaker, when I looked up there I couldn't see no place to get, I couldn't see no place to stand.

Q. Had you ever worked on these engine before?

A. I had helped to clean them out but I never tightened them up before but the Malleys, that is the big freight engine and this was just a small engine. The big Malleys have a platform that you can stand there and tighten up the bolts and burrs to close this door, but this one, this small engine there is nothing there but the headlight in the middle, right in the middle of this door and there are some little prongs running back from this headlight,—that is right in the middle of the door and it swings open with the door. I said to Mr.

(Testimony of James A. Nitcy.)

Hartman, the boilermaker, "Where am I to stand"?, and he said, [12] "Up on that headlight". When I get ready to get up there, when I tightened the bottom one and when I get up there and start to tighten the other, I tightened some of them and just snug them up, but my instructions from the boss, Mr. Stranberg, was to really get them tight so that any big puff would not come out there or blow any sand out in any way. So after I got them snugged down I had to go over them the second time and I got on the one that was just up there above the lamp where I was standing on this kind of a ledge or a little piece of iron that was out there. I was kind of afraid of this old open end wrench, it was an old beat up wrench, and I was afraid that it would slip and that I would go right on over on my head down on the ground. I stood there and run my hand up along the boiler to get the right length,—I was in a twisted position there. I had to keep my feet in one position there and reach right down between my feet to get hold of this big wrench and when I did I figured I would just give one hard jerk and I did that,—I gave one jerk and my back came around but the bolt didn't and that is when I hurt my spine the second time.

Q. What did you do immediately after that?

A. Well, I got down after I got my breath and then I went and checked out and went home and I washed up.

(Testimony of James A. Nitcy.)

Q. Did you report the injury when you checked out? [13]

A. I reported it to Harold Hartman when I went out, I was bent over and my arms were as long as my legs, I couldn't get straightened up, I kinked my back or something and I just had to get home and get something done or get somewhere to have something done.

Q. Who were you supposed to report that injury to?

A. Well, I don't exactly know who I was supposed to report it to but I guess to the boss, or to the man that was over me so far as that goes.

Q. And who was that?

A. Harold Hartman and Mr. Stranberg.

Q. Did you report this to Mr. Stranberg?

A. Yes, sir.

Q. That day? A. Yes, sir.

Q. What time that day?

A. Well, at about four o'clock in the afternoon.

Q. When were you injured that day?

A. About ten minutes to eleven.

Q. Did you work between the time you were injured and four o'clock when you reported it to Mr. Stranberg?

A. No, I checked out about eleven o'clock and I went home and got cleaned up and then I went up town to a chiropractor by the name of Miller to see if I could not get something done to help me.

Q. Was there any reason that you didn't report to Mr. [14] Stranberg before you went home?

(Testimony of James A. Nitcy.)

A. Well, the only reason was that I went over there to do it and the office was locked up and I couldn't report it to him and I came back about four o'clock and told him about it.

Q. Do you know, did he report that to anybody else?

A. Yes, I know that he didn't report it.

Q. How do you know that?

A. He told me so.

Q. When?

A. Well, I got the dates of that somewhere, I went to Mr. Stranberg and got a blue slip to go to Dr. Raff.

Q. When was that?

A. Well, that was sometime,—I have it there somewhere, the exact date.

Q. Approximately when was it?

A. Well, I can't just exactly say.

Q. Was it right away after this injury in October or was it quite sometime after that?

A. It was quite sometime after that.

Q. About how long?

A. To get this slip to go up to see Dr. Dupree or Dr. Peacock, when he told me,—I guess, Mr. Glasby, I don't understand the question.

Q. You said, I believe, that you found out that this injury [15] had not been reported. Now when was the time that you found that out, that is what I want to know?

A. That was a long time after, that was a long

(Testimony of James A. Nitcy.)

time after I got hurt, I have the record of it right there.

Q. What was said, what was that conversation with Mr. Stranberg?

A. Well, I went there for the purpose of getting a blue slip so that it would not cost me anything to go to Dr. Raff, because he had to send me to another doctor and that was my idea to get to go to Dr. Raff to have him send me to another doctor. I had asked him twice about sending me somewhere because we were getting nowhere with my spine and he kept telling me that he couldn't send me nowhere and then, in the roundhouse there we found a sheet of paper there with the names of different doctors that you could pick out to go to and I picked Dr. Peacock. Someone on the railroad there, I don't know who it was now, told me that he had to send me to one of those doctors if I would choose one and I picked Dr. Peacock and that is when Mr. Stranberg told me he hadn't reported it, that is when I got this blue slip from him.

Q. The bailiff has handed you a document, what is that?

A. Well, this is a safety rule that they made us work under.

Q. That is one rule? [16]

A. No, this is lots of rules.

Q. Who issued that to you?

A. Mr. Stranberg.

Q. When you went to work there?

(Testimony of James A. Nitcy.)

A. Yes, sir.

Q. Does that book say anything about reporting injuries?

A. I don't think that it does very much.

Q. Just see what it does say, Mr. Nitcy?

The Court: The book itself is the best evidence.

A. Well, I can't read very good, someone else will have to read it.

Mr. Glasby: I am going to offer this in evidence.

Mr. Sharp: We didn't know of this rule book, I would like to take a little time to examine it.

The Court: Very well, you may do that. Now, do you have any objection?

Mr. Sharp: None, your Honor.

The Court: It may be admitted.

Mr. Glasby: I would like to have Rule 1 in that book shown to the jury.

The Court: You may read it to the jury.

Mr. Glasby: "Rule No. 1. Report of [17] injury, no matter how trivial, shall be made at once."

Q. Did anybody at the Milwaukee roundhouse ever complain about your work before February of 1950?

A. No, sir.

Q. Have you ever been complimented on your work before that time?

A. Well, Mr. Stranberg used to have a by word always when he wanted me to do any work I would just start right out and he would always say "where is the fire", I was gone right away to do it, I didn't have to be told again and he compli-

(Testimony of James A. Nitey.)

mented me on that, that I was always gone to do the work when he mentioned it.

Q. Did he complain that you were not doing your work properly before February of 1950?

A. No, sir, he did not.

Q. Did you know Mr. Stranberg before you went to work in the Fall of 1949?

A. Yes, sir, I hired out for Mr. Stranberg in 1936, that is when I first got acquainted with him.

Q. Did you mean 1936?

A. No, in '46. I should have said in 1946.

Q. How long did you work at that time?

A. I forget the exact months, but it was six or eight, something like that, it may be a little longer than that I would say.

Q. Did Mr. Stranberg hire you in the Fall of 1949? A. Yes, sir. [18]

Q. Now, Mr. Nitey, did you take any doctor's treatments for these injuries? A. Yes, I did.

Q. Who mostly treated you? A. Dr. Raff.

Q. Do you know whether he was working for the Milwaukee Railroad?

A. He was supposed to be a Milwaukee doctor, that is the way I understood it, that is what I was told.

Q. Where did he reside?

A. St. Maries, Idaho.

Q. What treatment did he give you?

A. He gave me shots in my left hip and also heat treatments.

(Testimony of James A. Nitey.)

Q. Do you recall any other type of treatment that he gave you?

A. Yes, he gave me some pills for the pain once and he gave me some sleeping pills,—that is what he said it was for, I couldn't sleep at night.

Q. Were you ever doctored by any other railroad doctor besides Dr. Raff? A. Yes, I was.

Q. Who? A. Dr. Dupree.

Q. Where is Dr. Dupree located? [19]

A. Seattle, Washington.

Q. He was working for the Milwaukee Railroad, was he?

A. He was supposed to be the head surgeon, that is the way I understood it anyway.

Q. There was no other Railroad doctor who doctored you other than Dr. Dupree and Dr. Raff, is that right?

A. Well, I went for examination to Dr. Peacock once. He was a railroad doctor,—I am not sure, I don't know whether he was a railroad doctor but I do know that he was on the list and Dr. Raff sent me to him, I guess that was at my request.

Q. When did you doctor with Dr. Dupree in Seattle?

A. I got Dr. Raff to send me, that was the fifth of February, 1952, that is when my appointment called for.

Q. You have been handed a package, do you recognize that package? A. I do.

Q. Is there any printing on that package?

(Testimony of James A. Nitcy.)

A. Yes, the printing that my wife wrote on there.

Q. What does that say, do you know?

A. Yes, it says Salehexin, that is the way I pronounce it. It is spelled S-a-l-e-h-e-x-i-n, and it says three a day.

Q. Is there any other writing on there?

A. Yes, there is a Milwaukee sign on here.

Q. Is there anything in that package?

A. Yes, sir. [20]

Q. What is in there? A. One tablet.

Q. Who gave you that package,—let me ask, was that given to you by anyone?

A. Yes, Dr. Dupree gave it to me.

Q. Was there anything in that package besides that tablet?

A. There was a hundred tablets in the package.

Q. Was there any directions on there as to what you were to do with those tablets?

A. Not only the ones my wife wrote on there, as I told her.

Q. Did Dr. Dupree give you any directions?

A. As I remember he said three a day and that is what I told my wife and she wrote it on there.

Q. Were you treated by Dr. Dupree while you were in Seattle? A. Yes, sir.

Mr. Glasby: I will offer that package in evidence.

Mr. Sharp: I cannot see what the purpose of this is, I cannot see that it is serving any purpose.

(Testimony of James A. Nitcy.)

I am wondering if he is trying to say that he was examined and this is what the doctor gave him just this slip of paper with three a day on it. If he is going to try to use this to show what the doctor did he can call the doctor or surely he can have something more than this. [21]

The Court: Well, I am sure that I don't know any more about it than you do at this time, Mr. Sharp.

Mr. Glasby: The purpose of this exhibit is to show that Mr. Nitcy was treated by Dr. Dupree rather than just examined by him.

The Court: As I recall, there is nothing before the Court now. This was simply offered and I think you made some statement.

Mr. Sharp: Well, I object to this as I think it is not material, it is not relevant and is not serving the purpose for which counsel says it is introduced, if it is to show that the doctor, Dr. Dupree, treated this man rather than just examined him all it has on here is his wife's handwriting saying three a day.

The Court: I don't believe that it makes any difference here. It is immaterial, I am quite sure of that, but I believe I will admit it because it doesn't make any difference.

Mr. Glasby: I have no further direct examination at this time. However, I would like to recall this witness at a later stage in the proceedings.

The Court: If your doctor is here [22] now, I dislike to keep them waiting, I will permit you

(Testimony of James A. Nitey.)

to put the doctor on the stand and get through with him so he would not need to wait around.

Mr. Glasby: The doctor has not arrived yet.

The Court: Very well, you may go ahead with your cross examination.

Mr. Sharp: If the Court please, counsel has requested that he be permitted to recall this witness later and I am wondering if that would be on his direct case.

The Court: Well, if that is the case, he should finish before you cross examine. If this witness is going to be recalled I will permit you to postpone your cross examination until all of the direct examination is completed.

Mr. Glasby: I will withdraw my request at this time to recall him.

The Court: Then you may proceed with your cross examination.

Mr. Glasby: Of course, I would have the right to call this man on rebuttal if it becomes necessary.

The Court: That is right, you have that right to call him on rebuttal. [23]

Cross Examination

Q. (By Mr. Sharp): I think that you testified that you worked most of your life as a laborer?

A. That is right.

Q. Will you recall for the jury some of the various jobs that you have had throughout your life, you have stated that you were and are a laborer, just tell us about that, please?

(Testimony of James A. Nitey.)

A. I worked as a laborer always on the railroad. I also worked as a laborer on a ranch or a fire, I was also a laborer in a match mill in Minnesota. I have worked as a laborer all of my life, I worked as a laborer on the W.P.A. four years. I never had education enough to do anything else, I never had education enough to follow a trade and didn't,—

Q. —I only wanted the names of the type of work that you did and where you worked, I believe that you said that you worked in a match factory, is that right? A. Yes, sir.

Q. What kind of work was that?

A. That was carrying ribbons as a laborer.

Q. What do you mean by ribbons, you say you carried ribbons?

A. Yes, I carried them off the lathe, they made eight foot ribbons the width of a match box and they were creased to be folded and when they were folded they were in the [24] shape of a match box.

Q. Was that heavy work? A. Yes.

Q. How much did they weigh?

A. Well, you could carry as much as you could, as much as you had to carry to keep up with five lathes with two men, you carried them off and put them in a machine and chopped them, you kept those large tables empty for the men.

Q. And you say you worked on a ranch?

A. Yes.

Q. Were you ever engaged in breaking horses?

A. No, sir.

(Testimony of James A. Nitey.)

Q. Were you ever thrown from a horse?

A. Well, I was and I wasn't, the horse fell with me and left me on the ground and I naturally say that I was thrown or I wasn't, you can take it either way.

Q. What injuries did you receive, if any?

A. I received a broken leg, he fell on this leg (indicating) and broke it.

Q. Did you ever tell any of your doctors, say Dr. Dupree, that you had hurt your back while you were breaking horses?

A. No, sir, I did not.

Q. Did you ever tell any of your fellow employees at the [25] St. Maries Roundhouse that you had received such an injury?

A. Not that I remember of, no.

Q. You say that you don't remember, if you had told them that you would remember, would you not, you wouldn't just make up stories like that, would you?

Mr. Glasby: I don't believe that there is any proper foundation laid for that question.

A. I never told anybody, I never did break horses for anybody.

Mr. Sharp: I believe that I am laying the foundation.

The Court: Very well, you go ahead and lay the foundation.

Q. What was that last answer?

A. I never broke horses for anybody, do you mean broke them to ride, is that what you mean?

(Testimony of James A. Nitcy.)

Q. Yes, on a ranch, did you ever gentle any horses, horses that had never been broken, did you ever do any of that work?

A. What do you mean by breaking them, there is forty different ways to break horses. You can take a gentle horse and still break him to lay down or to stand on his hind feet or to make him into a rope horse, what [26] do you mean, just explain your question and I will answer it for you.

Q. Did you work with horses at all on the ranch?

A. Yes, I have, I have rode gentle horses a lot.

Q. And have you ridden horses that were never broken?

A. No, sir.

Q. They were always broken before you rode them?

A. They were always gentle horses when I rode them, yes.

Q. And other than the one fall that you say you had when you broke your leg, is that the only accident and injury?

A. That was a gentle horse, he just fell, his feet went from under him, he got scared of the saddle blanket, it was raining and we were out there in this gumbo, he was a very gentle horse.

Q. Did you ever tell Dr. Dupree that you had hurt your back while you were breaking horses?

A. No, sir, I never did.

Q. Did you ever tell the employees in the St. Maries Roundhouse that you had hurt your back?

A. No, sir.

(Testimony of James A. Nitcy.)

Q. The St. Maries Lumber Company, did you ever work for them? A. Yes, I did.

Q. And what period was that?

A. I think that was in 1946 or 1947, I don't remember the [27] dates but I do have a record of that, I have my slips from that company, as far as remembering the dates I can't do that. My wife took care of the records for me.

Q. Was this between the two periods that you worked for the railroad, did you work for the Lumber Company between the two periods that you worked for the railroad?

A. I worked for the railroad years ago.

Q. You testified, I believe, in answer to Mr. Glasby's question, that you worked for the railroad in 1946 and 1947, and that you returned again in the fall of 1949. Now, during that time did you work for the St. Maries Lumber Company?

A. I think I did, yes.

Q. Now, when you returned to the Milwaukee in the fall of 1949, did you tell any of your fellow employees that you had to quit the lumber company because the work was too hard on your back?

A. No, sir, I got laid off at the lumber company.

Q. Will you please listen to my question and then answer. Did you tell any of your fellow employees when you returned to the Milwaukee that the reason you quit the St. Maries Lumber Company was that the work was too hard on your back?

A. No, sir. [28]

Mr. Glasby: If he is going to ask for these con-

(Testimony of James A. Nitcy.)

versations I think he should first ask who he talked to and the foundation should be laid.

The Court: He has answered the question and I will let the answer stand.

Q. Prior to this alleged injury that you had in February of 1950, had you been treating with a chiropractor for a back injury or ailment?

A. Not for a back injury, I had sore muscles maybe from shoveling coal or some other work that I had done, sore arm muscles or something, I went there then, and I have went there for colds and other different things.

Q. But you say you didn't go to chiropractors for any back injury? A. No, none.

Q. Who were some of those chiropractors that you were going to in St. Maries or in that area?

A. Well, there was only one in St. Maries, Dr. Miller.

Q. In Lewiston?

A. I went to Lewiston, I believe, once but it wasn't for my back.

Q. And you went to one chiropractor in the St. Maries area but it wasn't for your back, is that right? A. That is right.

Q. Did you tell Dr. Roff that you had been going to [29] chiropractors for years for your back? A. I did not.

Q. Did you tell Dr. Dupree that?

A. No, sir.

Q. Prior to February, 1950, had you had any back trouble? A. No.

(Testimony of James A. Nitcy.)

Q. No trouble at all with your back?

A. I was always able to work, my back never bothered me only as I say sometimes I would get sore in the muscles, I would sore up some of my muscles. When I worked at the match factory that was hard carrying work, I would do that for eight hours and my muscles would get so hard that I would have to get them loosened up. Maybe I would have my wife rub them or maybe sometimes I would go to a chiropractor, I don't remember all of that.

Q. Where were those muscles that would get sore like you say, were they in the back?

A. No, in my arms and my shoulders.

Q. Then you never missed any work for the railroad because of any back injury, or for any one else, that is, you didn't miss any work on the railroad or any other place because of a back injury? A. Not that I remember, no.

Q. Wouldn't you remember it if you had any back trouble that caused you to stay away from work. If you can tell [30] me about what date it was.

A. No, I never remember any, I never had any trouble with my spine.

Q. Let's take 1947, did you ever stay away from work because of any injury to your back?

A. No, I never did.

Q. Will you look at this Exhibit No. 3, will you please tell me if that is your signature. Can you identify that as your signature?

(Testimony of James A. Nitcy.)

A. No, sir, that is not my signature. I will write my signature right below that and let everybody in the courtroom see it, I am a very poor writer, no, that is not my signature, that is not my writing, I never wrote that.

Mr. Sharp: I would like to offer this in evidence and if it is accepted in evidence I would like to read it to the jury at a later time, we can further identify it on plaintiff's case and we can clarify the matter of signature.

The Court: It may be admitted.

Q. Let me ask you again, do you deny that this is your signature? A. Yes, sir.

Q. Would it be your wife's?

A. It looks like her writing, she will have to decide that though. [31]

Q. Do you remember the incident that this relates to?

A. I remember that I sent word to him but I didn't know it was that way.

Mr. Sharp: I will read it, it is dated February 1st, 1947. It says, "Mr. Nels Stranberg: I hurt my back cranking the truck last night so I cannot come to work tonight, signed James Nitcy".

Q. Did you go to Dr. Miller in 1947 for a back injury or a back ailment?

A. Where, there are two Dr. Millers that I know.

Q. You testified, I believe, on direct examination that Dr. Miller in the St. Maries area treated you? A. In St. Maries, yes.

(Testimony of James A. Nitey.)

Q. Did you go to him in 1947 for a back ailment?

A. Not my back, I went for sore muscles. When I was working my arms and something like that would get sore in the muscles, but so far as my back was concerned I was able to work and lift and do things like that anywhere.

Q. You mentioned that there was another Dr. Miller, who is the other Dr. Miller?

A. He is a medical doctor in Spokane, I know him too, so when you say Dr. Miller I would like to know what doctor you mean.

Q. Yes, I will watch that. You testified on your direct examination that you did all kinds of jobs around that [32] roundhouse there, was that your assignment to help other people?

A. The way that was, and the only way that I can explain it. I was assigned up as a laborer on the Milwaukee, that was all that I was qualified to do, was just labor. Mr. Stranberg's code or orders was to help everybody to do everything that had to be done around there and that is just exactly what I did.

Q. Prior to February of 1950, did you ever complain about this work, did you ever complain to Mr. Stranberg or to anybody that you had too much work to do or that it was too hard on you or anything of that kind?

A. Well, I told him that the other fellows were laying off on the work there, here was the thing of it, the shift before me, whatever they left of

(Testimony of James A. Nitcy.)

their work I had to do, at times, I had to do their work and my work too and for that reason I could have complained and I probably did.

Q. You say that you probably complained?

A. Yes, sir.

Q. Prior to February of 1950?

A' Yes, sir.

Q. You complained that you had too much work to do, is that right?

A. Yes, sir, there was too much. [33]

Q. Did you have to work overtime to get all this work done, Mr. Nitcy?

A. Sometimes they kept me overtime.

Q. And, I presume, you were paid overtime?

A. Yes, sir.

Q. Now, let's turn to this alleged injury of February 10, 1950. You were working with Mr. Bogardis, did you say? A. Yes, sir.

Q. You had done this same job before, is that correct? A. That is correct.

Q. You had worked with Mr. Bogardis doing the same thing? A. Yes, sir.

Q. About how often does that barrel of oil have to be put on this little stand?

A. That would depend on the engines that would have to be washed. If there were lots of engines it wouldn't last long and if there aren't many it would last a long time.

Q. How about a week or two weeks?

A. It would last longer than that.

Q. Six months?

(Testimony of James A. Nitey.)

A. No, not like that, probably every two weeks.

Q. And that is about your average?

A. I would say that, yes.

Q. And that was one of your regular jobs, that you did with Mr. Bogardis?

A. All of us put up the barrels, as far as that is concerned, [34] but when it fell on our shift we had to put it up. If it fell on the other fellow's shift he was supposed to put it up.

Q. Then you were familiar with the job, is that right? A. Yes, sir.

Q. You knew it had to be done?

A. Yes, sir.

Q. And was it done in the same way always, with the same tools and appliances?

A. That is the only way that it could be done, that is all there was there to do it with.

Q. In other words, one man wheeled and the other man pulled?

A. The other man pulled, yes, sir.

Q. Then what makes this occasion so unusual?

A. Because Mr. Bogardis tipped this off on its side instead of setting it on its end.

Q. Is that the first time that ever happened?

A. I don't know, I know it's the first time it ever happened with me.

Q. And when it went on the ground, did you complain that it was too much to do then to lift it up two feet?

A. No, I didn't complain, I just told Mr. Bogardis that I had hurt my back on it.

(Testimony of James A. Nitey.)

Q. While it was laying there on the ground, did you complain that you didn't want to lift it, or anything of that kind, [35] that it was too much work for you to do? A. No, I didn't.

Q. You didn't complain? A. No.

Q. You just went ahead and lifted one end, you lifted one end, as I understand?

A. We had to set it up on end in order to get it on this stand.

Q. The barrel had to be stood on end and then you rocked it over?

A. Just rocked it right over, stick this nose under the end and rock them both over.

Q. And that is what the job consisted of, sitting the barrel on end and rocking it over?

A. There would be no use of me complaining when this was lifted up there and,——

The Court: ——Now, Mr. Witness, just answer the question and then stop talking. These are easy questions to answer.

Q. I believe that you said something about the footing being bad or something like that?

A. It was sand, soft sand.

Q. And the footing was bad, is that right?

A. I didn't say anything about the footing being bad. I said that my feet were in the sand and I couldn't jump away from the barrel, naturally I was sunk down in that sand [36] because it was loose sand.

Q. Did that make the job any harder for you to do?

(Testimony of James A. Nitey.)

A. Well, it would make it harder to jump away from the barrel or to get out from under it.

Q. This sand that you speak about, that didn't make it any harder, it didn't require any more strain to lift it?

A. Absolutely, you can take a barrel and put it down on that hard floor right there and it won't take near the strength to lift it than it would if the barrel were down in soft sand. It won't take near as much strength to lift it off the floor as if it was sunk in the sand for six inches, it would just be a block up against it for six inches and you are just working against that block.

Q. Do you recall making a statement to Mr. Hinie of the Railroad Company on October 25, 1951, about this so-called accident?

A. He came there and examined me on it and took down some stuff.

Q. And you told him the truth as to just what happened?

A. As near as I could.

Mr. Glasby: I am going to object again to this testimony concerning a conversation. I think that he would have to tell everybody that was there, the time [37] and the place and he would have to lay a better foundation.

Mr. Sharp: I believe I asked him if it was made on October 25, 1951, and if it was made to Mr. Hinie of the Railroad Company.

A. What date was that?

Q. October 25, 1951.

(Testimony of James A. Nitcy.)

A. I can't remember the date, he was there all right, I don't remember the date though.

Q. Did you sign a statement?

A. Yes, sir.

Q. Did you read the statement and then sign it?

A. What I could I did, I can't read very good and it was a sheet or two and I don't remember what it was, I remember that it was supposed to be what I told him there and I signed it.

Q. Will you look at each page of that, Mr. Nitcy, and tell me if that is your signature?

A. Well, yes, it looks like my signature.

Q. At that time did you tell Mr. Hinie,—did you make the following statement: "My footing was good, I didn't slip or trip while handling the barrel, but in the lifting I felt my back strain", did you make that statement?

A. My footing was good and I didn't slip. [38]

Q. Are you still saying that now, Mr. Nitcy, that your footing was good?

A. Certainly, I didn't slip.

Q. And your footing was good?

A. It was in the sand, I didn't slip, it wasn't a solid footing but it was in the sand, it was loose sand but I didn't slip.

Q. Was the footing good or wasn't it?

A. As far as slipping, that is all I can say as to that.

The Court: We will recess at this time until 1:30 this afternoon.

(Testimony of James A. Nitey.)

October 26, 1953, 1:30 p.m.

Q. Mr. Nitey, we were talking about this barrel episode, as I understood your testimony, what had to be done was that the barrel was lying on its side and it had to be put up, as you testified?

A. That is right.

Q. It had to be put up on its end and rocked over on to this two foot stand?

A. That is right.

Q. And as I understand it you didn't complain to Mr. Bogardis or anybody else prior to doing your part of this lifting?

A. Not that I remember.

Q. And after it happened you continued to work, is that right? A. That is right.

Q. And did you get a slip and go to the doctor then, by any [39] chance, did you go to the railroad doctor, Mr. Nitey?

A. I went to the railroad doctor, I don't remember when I got a slip, I paid my own way for a long time.

Q. You say that you paid your own way?

A. Yes, sir.

Q. Why didn't you get a regular slip?

A. Well, I didn't know that I could get one.

Q. You didn't know that?

A. No, I didn't understand it.

Q. Then as I understand it, you had not had a railroad slip to go to a railroad doctor before?

A. Not there at least.

Q. I beg your pardon?

(Testimony of James A. Nitcy.)

A. Not there, I hadn't.

Q. Had you at some other place?

A. I don't remember whether I did or not.

Q. You don't remember. Let me put it like this, prior to this episode of February 10 of 1950 did you get any slip from a foreman of the Milwaukee to go to a Milwaukee hospital association doctor?

A. I don't think I did.

Q. You don't think that you did?

A. No, I don't.

Q. Would you recall if you had?

A. Well, I don't believe I did because I didn't have nothing to go for unless it was something that I don't remember [40] now.

Q. Well, how about a cold or something like that?

A. Well, I guess I could have, I couldn't say about that.

Q. Well, while you were working for the Milwaukee you could have gotten a slip and gone to the doctor? A. What was that?

Q. I say, did you ever go to your foreman, while you were working for the Milwaukee, and get a medical slip and take it to the railroad doctor for treatment, either for an injury or illness?

A. I don't remember.

Q. Don't you think that you would remember if you had gone to the railroad doctor, in other words, if it is free service, would you remember about it?

(Testimony of James A. Nitcy.)

A. I went with this finger (indicating), that was at Marmarth, North Dakota.

Q. At Marmarth, North Dakota, how many years ago was that?

A. I couldn't say as to the date but it was quite a few years ago, I smashed a finger (indicating) and I went to the railroad doctor because I was working on the section at that time, but I don't remember whether I got a slip then or not.

Q. But the railroad took care of that?

A. Yes.

Q. Now, how about in 1946 or 1947 when you were working at this same place, the St. Maries Roundhouse, did you ever [41] go to the St. Maries Hospital there, to a railroad doctor?

A. Not that I remember, I didn't get no slip if I did.

Q. Did you know that the service was provided, that you could get treatment?

A. No, I didn't know that.

Q. When did you first find out that such service was provided.

A. Well, I don't just exactly remember when that was. There was a fellow there that told me when I was up at the desk. I told him that I was going to see Dr. Raff, I was just checking out at that time and I said I am going up to see Dr. Raff and give him three or four more dollars and he said, "Are you paying your own way?" and I said, "I certainly am and I have been", and he said, "You can get a slip".

(Testimony of James A. Nitcy.)

Q. When was that?

A. I don't remember the date of that, I never kept no track of it.

Q. Well, how about figuring in relation to these so-called injuries in February, from then on to October?

A. That was before the last injury.

Q. Before the last injury?

A. If I remember, I didn't keep no tally because I thought nothing of it.

Q. Then we have that clear, prior to the first injury you [42] never went to a Milwaukee Hospital Association doctor and you didn't know that such procedure was provided, is that correct?

A. I knew Dr. Raff was but I didn't know I could get a slip to go there because I was paying my own way and I didn't pay no attention to it.

Mr. Sharp: It seems to me that this is a bit conflicting.

The Court: Yes, it is. Now, Mr. Witness, if you will just answer the question and then quit talking, as I have said before, we will get along a good deal faster. Listen to the question that counsel asks and then just answer the question.

Q. Well, now, let's start over, prior to February 10th, 1950, did you ever go to a Milwaukee Hospital Association or a railroad doctor with a slip that you had obtained from your foreman, for any medical service?

A. I don't remember.

Q. If such a thing had happened would you recall it?

(Testimony of James A. Nitcy.)

Mr. Glasby: I object to that, I think it is argumentative.

The Court: This "don't remember" is quite an answer but I am going to permit him to answer this question.

A. Well, as I said, I don't remember. [43]

Q. When was the first time that you got a medical slip from your foreman and went to a Milwaukee Hospital Association doctor or a so-called railroad doctor?

A. I don't remember any date.

Q. I assume that if you had gone to a railroad doctor a few months before February of 1950 you would remember?

A. I don't know that I did because I don't remember about it.

Q. You said that you always paid your way?

A. I did pay my way from the time that I was hurt, from the time that I was hurt the first time up until I first started to get slips to Dr. Raff. I don't remember when I got the first slip.

Q. And prior to that,—prior to the first alleged injury you paid your own way?

A. As far as I remember, yes, sir.

Q. I take it that after this barrel incident happened, you didn't report it?

A. Yes, certainly I reported it.

Q. Oh, you did report it, who did you report it to?

A. To Mr. Stranberg and also to Mr. Harry Bogardis.

(Testimony of James A. Nitcy.)

Q. You were working with Harry Bogardis, I believe you said?

A. Yes, sir, and I told him.

Q. And you didn't get a slip from Mr. Stranberg?

A. No.

Q. That is, to go to a doctor? [44]

A. Not at that time, no, sir.

Q. Now, Mr. Nitcy, let's turn to the date of October 13, 1950, you mentioned something about working on the front end of an engine, had you done that work before?

A. On the big engines, yes, that was a freight engine.

Q. And you had never worked on this sized engine?

A. I don't remember that, I don't remember just what engines I worked on.

Q. Well, I believe that you said that it was different than what you worked on, than the Malley type which you had worked on?

A. Yes, sir.

Q. If you had worked on one of these prior to that time would you recall that?

A. I could have worked,——

Q. ——I mean on the front end, Mr. Nitcy, the same kind of a job that you were doing at that time?

A. I don't remember whether I did or not.

Q. When you were asked to go up there and loosen these bolts or to tighten them, I guess they were loosened?

A. Well, I wouldn't say as I loosened them, I

(Testimony of James A. Nitey.)

think he had the front end open but I wouldn't say that for sure. I had cleaned up the sand and I was tightening them when I got hurt.

Q. He had probably been up there and opened that up? [45]

A. Yes, I think he opened the engine.

Q. That is what I say, and then you were asked to clean out the sand? A. Yes.

Q. And you had done that job before, had you not? A. Yes, I had.

Q. On that type of an engine?

A. Not that I remember, but on the Malleys I had.

Q. Did you ask for any help when you were told to go up there?

A. On this particular little engine?

Q. Yes. A. No, I didn't.

Q. You didn't complain about going up there?

A. I asked just where I was to stand, I said "Where will I stand" because there was just this little narrow place there to stand on the headlights.

Q. And now just answer my question please,—you didn't complain before you went up there?

A. No.

Q. The tool that you used up there was a wrench, what kind of a wrench was it?

A. An open end wrench.

Q. That would be a solid wrench?

A. No, it would be an open end wrench, a solid

(Testimony of James A. Nitcy.)

wrench would be a box wrench, that would fit all around the bur or nut. [46]

Q. But this was just one piece of metal?

A. Yes, with a U to fit over the end.

Q. Was that the usual and customary tool to use there?

A. That was all I ever used on the Malleys.

Q. Did that wrench come with the engine?

A. No, that was in the roundhouse, at the desk there where they kept it.

Q. There was nothing wrong with the tool, was there?

A. Well, all of those open end wrenches are naturally loose and you have to be careful that they stay on the bur.

Q. You mean that the wrench is loose?

A. Yes, the wrench is loose, it is a little bit wide and they are wore and battered, most all of the open end wrenches.

Q. Do you recall this statement that we discussed that you made to Mr. Hinie. You remember the statement of October 24th or 25th, 1951?

A. Some of it.

Q. You remember signing it, do you?

A. Yes.

Q. Do you remember saying, "There was nothing defective about the wrench I was using and it did not slip on the bolt"?

A. That is correct.

Q. That is correct?

A. Yes, it did not slip on the bolt. [47]

(Testimony of James A. Nitey.)

Q. As soon as this happened did you get a slip and go to a Milwaukee Hospital Association doctor?

A. I don't understand.

Q. As soon as this happened, this October 13 incident up on the engine, I believe that you testified that you came down from the engine,—then did you go to a Milwaukee Hospital Association doctor?

A. I went to Dr. Raff.

Q. On that same day?

A. No, not that same day.

Q. You didn't? A. No.

Q. Then you didn't get a slip and go to the doctor?

A. No.

Q. When did you first get a slip and go to him?

A. I don't remember when I got the first slip, I never kept no track of when I got that first slip.

Q. But you did go to Dr. Raff?

A. Not that day.

Q. How soon after did you go?

A. I would say it was four or five days after.

Q. Did you tell him that you were injured then?

A. Yes, I did.

Q. But that same day you did go to a doctor, as I understand it?

A. Yes, sir, to Dr. Miller, a chiropractor. [48]

Q. A chiropractor? A. Yes, sir.

Q. And that night you went to another chiropractor?

A. No, sir.

Q. How about this Dr. Critchley?

A. I went to him the next day.

Q. Was he a railroad doctor?

(Testimony of James A. Nitey.)

A. No, I don't think so.

Q. Maybe I have covered this but if I did I didn't get it clearly, how soon was it that you went to a doctor,—a company doctor after this episode of October 13?

A. It was four or five days after.

Q. And then you continued to work, as I understood it, you continued to work for how long, Mr. Nitey?

A. Yes, that's right, I continued to work.

Q. For how long?

A. Well, I worked until I laid off until 1951.

Q. What part of 1951?

A. I think it was the eighth.

Q. You mean the eighth month?

A. The 8th of October, I think.

Q. That was about a year then, you continued to work for about a year?

A. Yes, sir, trying to get cured, trying to get well.

Q. Do you say that you were bothered after this episode, [49] did you have to lay off work because of this condition?

A. At times, yes, sir.

Q. How often did you lay off work?

A. Whenever I got so lame that I couldn't go to work, I would go to a doctor and get relief,—I would get relief for a day or two of some kind.

Q. Were you off for any length of time, say approximately a week or so?

A. I don't just remember that.

Q. Were you off for two weeks for a vacation?

A. I was never off for two weeks, I was not eligible for a two weeks vacation. I took a trip for

(Testimony of James A. Nitcy.)

two weeks back East, I was called back East on account of sickness.

Q. That was after October 13, 1950, episode and prior to the time that you quit in 1951?

A. That was before,—that was before I was hurt the second time.

Q. My question is this, you claim that you had this injury on October 13, 1950, and that you worked up to October 8, 1951. Now, during that period of time were you off because of this back condition?

A. I think that I had a vacation for one week at that time.

Q. You had a vacation? A. Yes.

Q. Otherwise you worked continually, did you?

A. Well, outside of laying off to go to the doctor or something.

Mr. Sharp: Is your doctor here yet, Mr. Glasby?

Mr. Glasby: Yes, the doctor is here.

The Court: Then I will permit this witness to step down. I have always made it a rule to allow counsel to use the doctors when they come. They are quite busy people these days.

DR. H. DON MOSLEY

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): What is your occupation?

A. Physician and surgeon.

(Testimony of Dr. H. Don Mosley.)

Q. And where did you take your training and how long did you train before you went into the practice of medicine?

The Court: I wonder if you will admit the doctor's qualifications.

Mr. Sharp: Yes, we will admit that.

Mr. Glasby: I had a question or two that I wanted to ask the Doctor.

The Court: Go ahead, you may ask anything you want, I thought it would save going through [51] all of the days he went to school and all the time he was an intern and such qualifications. Go ahead.

Q. Doctor, would you give us a brief summary of the work that you have had professionally on the bones, the treatment of bones and particularly the spine?

A. I graduated from the University of Tennessee and took one year of internship at St. Anthony Hospital at Oklahoma City, Oklahoma. Following that I had one year of general surgery at the same hospital, the St. Anthony Hospital at Oklahoma City. Immediately following that I went into the service as a general surgeon, during the period of time that I served overseas, approximately 18 months, that was either acting as or chief of surgery of the 183rd general hospital, which included all general surgery, orthopedic, O.B.G.Y.N, and general surgery. After being discharged from the service I became affiliated with the Western Hospital Association at St. Maries, Idaho, being super-

(Testimony of Dr. H. Don Mosley.)

visor and general surgeon for the Milwaukee Railroad, being chief surgeon for the Milwaukee Railroad and supervisor of the hospital up until the hospital was sold. The Western Hospital Association was dissolved sometime in March, April, May or June of 1950. Following the disposition of the hospital by the Western Hospital Association I moved to Coeur [52] d'Alene where I have been in the general practice with emphasis upon general surgery, since July of 1950.

Q. Have you done quite a bit of bone work?

A. While managing and supervising the St. Maries Hospital for the Western Hospital Association which at that time was engaged in contract work,—logging contract work, we came in contact with much traumatic orthopedic surgery.

Q. What does traumatic mean, Doctor?

A. Our main condition which we had, were logs rolling over someone, fractured backs, fractured pelvis, fractured legs, simple and compound, with various complications. It would take quite a long time to explain all the conditions that we came in contact with.

Q. Doctor, you said that you had some position with the Milwaukee Railroad, would you explain what that position was and tell us who your superiors were and if you had any subordinates, who they were, give us a short explanation of the set-up of the Milwaukee doctors at St. Maries and in that area?

A. Being district surgeon for the Milwaukee

(Testimony of Dr. H. Don Mosley.)

Railroad Company I covered all of the area from East Portal, which I believe is directly across the Montana-Idaho border, to Maldon, that included all of the branch lines of the Milwaukee Railroad. [53]

Q. Who was your immediate superior?

A. When I first accepted the position Dr. Allen of Seattle was the chief surgeon of lines west on the Milwaukee Railroad. I do not know when our present chief surgeon took over, I have no idea.

Q. How many districts were there in the west?

A. You mean in lines west?

Q. In lines west?

A. I am not sure but I believe there were three or four.

Q. And you were one of three or four?

A. Yes, sir.

Q. Do you have any subordinates?

A. Yes, all of the local surgeons come under the district surgeons for elective surgery or non-emergent surgery, that is, Spokane, Maldon, Rosalia, Avery, Coeur d'Alene, Boville and all the branch lines.

The Court: It seems to me that we are taking up a lot of time unnecessarily, the doctor's qualifications have been admitted.

Q. Dr. Mosley, have you ever examined the plaintiff in this action, Mr. Nitcy?

A. Yes, sir.

Q. When was the first time that you examined him?

(Testimony of Dr. H. Don Mosley.)

A. I would not be sure without my notes, but I think it was in July of 1952. [54]

The Court: You may refer to any notes you have concerning your examination and treatment, Doctor.

Q. Did Dr. Raff ever consult with you prior to 1952 with regard to the plaintiff in this action?

A. I do not know, I don't recall.

Q. You don't remember of that?

A. No, sir.

Q. Doctor, what did your examination in 1952 reveal?

A. In detail I do not believe that I can give all of the findings, but he came in with a chief complaint,—you want the physical findings?

Q. That would be fine.

A. He came with a history of having had previous trouble with his back for quite some time, I don't know whether it was 18 months or two years, I wouldn't know about that without referring to my record and I am sorry I don't have my records with me.

Q. That would place the time around 1950, would it, Doctor?

A. Yes, at the time of the examination the man was having some difficulty with his back, stiffness, pain and inability to stay in one position for any period of time, then upon physical examination there was tenderness in the low back area which would be expected from [55] his history, so to speak. There was tenderness over the lower ver-

(Testimony of Dr. H. Don Mosley.)

tebra, he did not have any of the signs,—he did have symptoms of left sciatica radiating down into the leg. I mentioned that he had no signs, the reflexes were normal and there was no atrophy and no shriveling up of either leg or thigh, but he did have a marked spasm which gave him an abnormal curvature of the spine, due to muscle spasm. That was my impression at that time. The man had stated that he had been unable to work for several months. The reason for examining the individual on the first contact that I recall was for the filling out of papers to be sent back to some railroad commission or bureau for his liability or something of that kind, as I recall, that was the first contact that I had with this patient.

Q. And what were your findings on that report, Doctor?

A. My findings on that report were based upon a review of X-ray which the man brought to me, history, symptomatology and my objective findings upon examination. These were,—I will try to give them as briefly as possible, the first, X-ray which the individual brought to me at the time, for review, and I believe that was sometime in July of 1952, showed a lippling or spur formation between the third and fourth lumbar vertebra,—a deviation of the spine to the right in a curvature which was considered to be due to [56] spasm of muscles on the left side, making it a something like a bow-string. On one film there was a questionable fractured vertebra in the thoracic or dorsal region, in

(Testimony of Dr. H. Don Mosley.)

the rib cage, the 10th and 11th. There are 12 vertebrae in the chest or rib cage. Those were the significant findings on the X-rays. The history, of course, was subjective, he gave a history of having injured his back sometime in the early 1950 and again in the latter months of 1950 although he stated, I believe, that he had not been hospitalized for either ailment. The objective findings were that the man had limited flexion ability at the hips which would allow him to extend his hand barely below the knees. There were muscle spasms on the left lumbar spinal musculature. On deviation to the right the motion was much less than on deviation to the left. On hyper-extension there was a minimal amount of extension ability. There were no signs of anesthesia, no signs of muscle atrophy, the reflexes were normal in both of the lower extremities.

Q. Doctor, did you, at that time, determine in your opinion the man's ability to work at his usual occupation? A. Yes.

Q. And what did you determine that to be?

A. Well, it was very apparent, objectively, that the patient would be unable to go back into common labor. [57]

Q. Doctor, were you subpoenaed to come here?

A. I beg your pardon?

Q. Were you brought in here under subpoena?

A. Yes, sir.

Mr. Glasby: I believe that is all I have under direct examination.

(Testimony of Dr. H. Don Mosley.)

Cross Examination

Q. (By Mr. Sharp): Doctor, in lay language would you say that the condition of his back is mainly due to arthritis?

A. He has some arthritis. Arthritis does not come on suddenly and acutely. Hypertrophic arthritis does not come on suddenly or acutely without some precipitating cause.

Q. I believe you said that hypertrophic arthritis does not come on suddenly, what is hypertrophic arthritis?

A. Hypertrophic arthritis in its definition, I believe, to the best of my knowledge, is a building of bone or a lippling or a spur formation which cannot occur spontaneously or immediately.

Q. Then it is a growth, more of an illness than something brought on by injury?

A. On hypertrophic arthritis it is rare to find an infectious process has been responsible for the building up of the [58] spur formation or bone. It is most commonly found in the weight bearing joints of the body, the hips, the knees, and the lumbar spine. Also in an individual who has carried on hard manual labor with repeated attacks of trauma or with some acute episode which produces it.

Q. About how many people have arthritis that are over 50 years old, that is, people that you have examined, is it a pretty common disease or matter in people of that age?

(Testimony of Dr. H. Don Mosley.)

A. It is not uncommon in anyone over 55 or 60 years of age.

Q. Doctor, supposing it shows up,—supposing that a doctor finds arthritis and what if the patient or individual follows their or his normal work, would it increase, would the condition get worse, that is, osteo-arthritis?

A. Osteo-arthritis and hypertrophic arthritis are synonymous. If one led a sedentary life after having developed hypertrophic arthritis there should be no reason for any progressive change. I wondered if I understood you.

Q. That was my question, yes, Doctor. You say that this man does have an arthritic condition?

A. In localized joints. [59]

Q. And by localized joints you mean in a certain area?

A. A certain area,—perhaps I could put it better this way, generalized arthritic condition afflicts all of the joints and there has been some precipitating cause when the joints involved are localized.

Q. You mean it could be a number of traumas or continued hard work, is that what you mean, Doctor?

A. Yes, that is right.

Q. You examined this man first in July of 1952, is that correct?

A. Yes, I believe that is right.

Q. And his mention of injuries, that is what he told you, isn't it,—he told you of certain alleged injuries, is that right?

A. Yes.

Q. But of your own personal knowledge, of

(Testimony of Dr. H. Don Mosley.)

course, you cannot testify to that, whether he had injuries or not? A. No, sir.

The Court: We will take a fifteen minute recess at this time.

October 26, 1953, 2:30 p.m.

Q. Doctor, I think I was asking you about the so-called injuries related to you, those were things that he told you and, of course, from your observation you [60] could not say one way or another about them?

A. Other than the evidence on the X-rays.

Q. Yes, but other than the condition of his back,—as far as his claiming that he was hurt on such and such a date, from lifting a barrel on such and such a date. When you examined him two years later it was just what he told you about that, that is what you had? A. That is true.

Q. The condition of his back, of course, that was apparent from your examination?

A. That is right.

Q. And you testified that you found no evidence of atrophy at all?

A. No evidence of atrophy of the muscles.

Q. There was no shriveling of the leg?

A. That is right.

Q. And the reflexes, I believe you said, were normal? A. Yes.

Mr. Sharp: I think that is all.

Redirect Examination

Q. (By Mr. Glasby): Dr. Mosley, assuming that

(Testimony of Dr. H. Don Mosley.)

those injuries that showed up on your objective findings were fresh and assuming that you had been called on the case, what treatment [61] would you have given?

Mr. Sharp: We object to that, if the Court please, we must object to that type of questioning. These injuries that he speaks of, we don't know anything about that.

The Court: That is right, the assumption is based on facts that are not in evidence. The objection is sustained.

Q. Dr. Mosley, if you were to find a person with evidence as you found present on Mr. Nitey's back shortly after the injuries, what treatment would you prescribe?

Mr. Sharp: We must make the same objection.

The Court: The same ruling.

Mr. Glasby: Do I understand that the ground of sustaining the objection is that there is no evidence to show that this condition of the back was caused by the injuries?

The Court: Of course, Mr. Glasby, the Court is not under cross examination here, the Court just rules. But for your benefit, although it is entirely out of order for the Court to be questioned by counsel as to its reason for any ruling, for your benefit I will say that there was no evidence upon which to base the assumption. Your [62] assumption was based upon something not in the record and an expert cannot give an opinion upon a matter or upon a hypothetical question, in answer to

(Testimony of Dr. H. Don Mosley.)

such question unless there is some evidence in the record upon which to base that question. Now, you may go ahead.

Q. Dr. Mosley, didn't you testify that there was some evidence of a compression fracture in Mr. Nitcy's back?

A. I am not sure that is the question I was asked nor the answer that I gave.

Q. Did you find some evidence of a compression fracture in the back of James Nitcy?

A. Yes, there was some evidence of a minimal compression fracture.

Q. Doctor, what would be your treatment of a minimal compression fracture?

A. That is a difficult question to answer, it would depend upon the findings at the time of the initial visit and also the findings at that time. Ordinarily they are treated by immobilization and some support and, of course, something for the pain,—I am not right sure that I understand your question.

Q. Well, how would you treat a compression fracture, that was my question? [63]

A. Well, repeating, it would depend, to a degree on the condition of the patient and, of course, the degree of the injury, ordinarily they are immobilized and some form of support given, some form of cast or back support and hospitalization and symptomatic treatment, pain relievers, and so forth.

Q. Now, just so this point can be clarified a little. I believe you stated on your examination in

(Testimony of Dr. H. Don Mosley.)

regard to this arthritic or spur formation, you stated that a localized formation of that kind would be precipitated by something, will you clarify that, Doctor, just what do you mean by precipitated by some force?

A. Yes, ordinarily any hypertrophic arthritis is due to trauma.

Mr. Glasby: That is all.

Recross Examination

Q. (By Mr. Sharp): Ordinarily and normally under the condition due to trauma, would you say, Doctor, based on your experience in examining people who have worked quite a bit at physical labor or what may be referred to as common labor, a person who has done hard work all of his life, is he more liable to have that condition than anyone else?

A. You mean hypertrophic type of arthritis?

Q. Yes. A. That is true.

Q. Which is what you testified that your examination disclosed that this man had?

A. That is right.

Q. And by trauma, Doctor, that could be many incidents over the years? A. That is true.

Q. Doctor, what do you mean by minimal? I believe you said that there was some evidence of a minimal compression fracture, what do you mean by that?

A. One can have an acute compression fracture with the vertebra going down to possibly one-half

(Testimony of Dr. H. Don Mosley.)

the depth on one side and coming up to the normal depth on the other side, and then one can have a compression fracture in which there is very little, in fact, no compression of the vertebra but with the tip fractured.

Q. And do you mean by that a spur fracture?

A. Well, it would result in a spur in a matter of time.

Q. And that is the condition of Mr. Nitcy's back, the minimal fracture?

A. I beg your pardon?

Q. That is the condition, the last description you gave, the minimal compression fracture?

A. Yes, that is right, as far as I can tell from observation [65] and studies that I have reviewed. There is no smashing down of the vertebra to a degree where it is one-half as thick as the one below, do I make that clear?

Q. Yes.

Mr. Sharp: That is all.

Mr. Glasby: That is all. And now I will recall Mr. Nitcy.

JAMES A. NITCY

being recalled for continued cross examination.

Cross Examination—(Continued)

Q. (By Mr. Sharp): I think, Mr. Nitcy, that you testified that in 1947 you consulted with Dr. Miller, a chiropractor, near St. Maries rather than the one in Spokane, but that was not for the back condition, is that right?

(Testimony of James A. Nitcy.)

A. Which Dr. Miller do you refer to?

Q. The one in or near St. Maries, I believe that you said that you consulted with him in 1947, is that correct?

A. I don't remember whether I did or not in 1947.

Q. If you had consulted with him in 1947 for a back condition, would you recall it?

A. I think I would. I might have been there for a sore muscle or something like that but not for a back injury.

Q. How about 1948, would your answer be the same as to that year, 1948? [66]

A. Yes, it would.

Q. No back condition?

A. Yes, sir, no back injury.

Q. And what about 1949? A. No.

Q. And 1950?

A. Yes, I went to him in 1950.

Q. For what? A. For my back.

Q. And when was that?

A. I don't remember the date, I never kept track of the date.

Q. Was it before or after the so-called barrel episode? A. It was after.

Q. Was it after the episode on the engine?

A. Yes, it was.

Q. One more question, I don't believe I covered this. When you testified that you were working on this type C engine, the wrench was in your right hand and you were holding on with your left hand,

(Testimony of James A. Nitcy.)

is that correct? A. That is correct.

Mr. Sharp: That is all the questions we have.

Redirect Examination

Q. (By Mr. Glasby): Just to clarify this one matter. What was the usual [67] and ordinary method of loading these barrels of oil on to this sled?

A. When you wheeled them in there on this two-wheeled cart or truck you set them on end. You had to get them on end in order to get this frame-work under them.

Q. You had loaded other barrels and you always had them upright, is that correct?

A. That is right.

Q. And this was the first time a barrel had gotten down in a horizontal position for you, is that right? A. Yes.

Q. What caused it to get into this position?

A. Well, when we pulled up there this sand hole was there, filled with sand and one wheel of the truck naturally dropped off in the hole there and, of course, Harry tipped it on over and it went down on its side. That caused us to have to lift it up again.

Q. Could you say whether he could have prevented that barrel from going over?

A. I think he could have.

Q. Were there any other types of truck around there to use? A. No, there wasn't.

(Testimony of James A. Nitey.)

Q. Was there at any time after that any other kind of truck there to use?

A. Yes, there was.

Q. And what were they? [68]

A. They were regular barrel trucks with hoops, two-wheeled trucks that were dished out in the shape of a barrel.

Mr. Sharp: I think, if the Court please, that plaintiff's counsel is going beyond his redirect examination now and is bringing up something that certainly was not testified to in any cross examination, and I make a motion at this time that it be stricken from the record and the jury instructed to disregard it.

The Court: Your objection is well taken but I will allow him to reopen his case and put in further redirect if he cares to.

Mr. Glasby: I will ask permission to reopen at this time.

The Court: You may go ahead. I will permit counsel to go ahead and put in anything he wants to. However, you will have an opportunity to re-cross examine the witness if you care to.

Q. After this February 10th incident were there any other types of trucks provided?

The Court: Of course, I will sustain the objection formerly made now to this question because what happened after this does not make any difference here and the jury is instructed to disregard this question and answer. It can only be prejudicial

(Testimony of James A. Nitcy.)

in [69] this matter as it has nothing to do with this case.

Q. Was your work on that engine done under any direct supervision?

A. I don't understand.

Q. Were you directly supervised in doing your work on this engine?

A. What do you mean by supervised?

Q. Does anybody direct you how to do the work? A. Yes, sir.

Q. And they directed you to do that specific job, did they? A. Yes, sir.

Mr. Glasby: That is all.

Mr. Sharp: No questions.

H. C. HARTMAN

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Do you know the plaintiff in this action? A. Yes, sir.

Q. And how long have you known him?

A. Since the time he first started to work for the Milwaukee in St. Maries, I guess that was about 1947 or 1948.

Q. Did he work continuously from 1947 on? [70]

A. He was on days at one time and then he worked nights and then he was off and came back again.

Q. Do you remember when he came back?

(Testimony of H. C. Hartman.)

A. I don't remember the dates.

Q. Did you work with him some?

A. I worked with him around the roundhouse.

Q. Have you observed him working?

A. Yes.

Q. Do you know anything about the kind of workman he was?

A. Well, Jim was a good worker when he was on the job.

Q. Do you know what job he was hired to do there? A. Labor.

Q. Do you know if he did anything else around there? A. Yes, he helped me some.

Q. And what type of work was that, when he helped you? A. That was boiler work.

Q. Boiler-maker?

A. Boiler-maker's helper.

Q. Is that a particular classification, boiler-maker's helper?

A. Yes, it is, it takes time for a helper to get the experience where he would be capable of being a helper.

Q. How long would you say it would take?

A. It all depends on the man, all the way from one to three or four years to make a good helper.

Q. Did Jim, to your knowledge, do a lot of boiler-maker's helper work? [71]

A. Just when I needed a helper, I couldn't say how much he did, I just took a laborer whenever I needed a helper.

(Testimony of H. C. Hartman.)

Q. Did you ever have an experienced helper to work with you?

A. I had an experienced helper until he was laid off.

Q. Do you remember when it was?

A. It was around 1949 or 1950, I couldn't say exactly.

Q. How long have you worked on the railroad?

A. About 32 years.

Q. And in what capacity have you worked?

A. As boiler-maker.

Q. You always worked as a boiler-maker?

A. Except when I was learning the trade.

Q. And how long did it take you to learn the trade?

A. Four years.

Q. Have you always worked for the Milwaukee?

A. No.

Q. What other railroad have you worked for?

A. For the Northern Pacific, the Alaska Railroad, and the Milwaukee.

Q. Where for the N. P. did you work?

A. You say where?

Q. Yes.

A. On nearly the whole system, I worked up at Dilworth, Minnesota; Livingston, Montana; Jamestown, South Dakota; Spokane, Washington; Seattle and Tacoma. [72]

Q. Does a boiler-maker, when working in these shops, always have a boiler-maker's helper with him?

A. In the shops, yes, that is in the bigger shops.

(Testimony of H. C. Hartman.)

Q. Is a boiler-maker supposed to have a boiler-maker's helper?

A. Yes, it is practically compulsory, a boiler-maker cannot do much without one.

Q. Did you always have a boiler-maker's helper at St. Maries?

A. Only until the one that I had got laid off, after that I didn't have one.

Q. Did you complain about that to the Railroad Company?

A. I said that if they didn't give me a helper they would have to give whoever did help me helper's wages.

Q. And what did you do for help when you couldn't have a boiler-maker's helper?

A. I had to have a laborer.

Q. And did the plaintiff in this action help you some? A. Yes, sir.

Q. Do you remember any occasion or any incident that happened while the plaintiff was working for you, any injury?

A. The only thing was when he was tightening the lugs on the front end door, he was up on the headlight, standing on the headlight bracket and when he came down he said [73] he had kinked his back. I was standing down below and I didn't see anything that happened that would cause it.

Q. You didn't actually see the injury?

A. No, he told me that he had a kink in his back.

(Testimony of H. C. Hartman.)

Q. Was that a rather simple job that he was doing there?

A. It was as far as being heavy work is concerned, if that is what you mean. It was not heavy work but it was a little awkward to get at.

Q. Was it necessary that he stand in an awkward pose to get at this?

A. Yes, there was no way to get out of it.

Q. How big a space is this headlamp?

A. Well, the headlamp itself is about 12 inches in length and then it stands away from the front end about six or eight inches.

Q. And that is what he had to stand on, was it, this headlamp?

A. Between the headlight and the front end, yes.

Q. Was there quite a large space for him to stand in there?

A. Just a slot of about eight inches.

Q. About eight inches all the way across?

A. About eight inches from the front end to the back of the headlight and about 18 inches wide.

Q. Is that ample room up there to stand?

A. Yes, plenty of room to stand. [74]

Q. Could you explain to the jury about how big a place that was?

A. Yes, it was about that wide and about that long (indicating).

Q. And was that the same thickness all the way across there? A. Yes.

Q. And it didn't taper down to a small point any place? A. No.

(Testimony of H. C. Hartman.)

Q. Was the plaintiff an experienced helper?

A. No.

Q. Would you say that he was a green hand at that? A. Yes, he was.

Q. And did you have to tell him what to do and how to do it? A. Yes.

Q. And did you tell him on that day?

A. Yes, I guess I did, I must have told him because he was up there tightening them up.

Q. Did he work under your supervision?

A. Yes, under my supervision.

Q. And what equipment was there to work with?

A. A three-quarter open end wrench.

Q. You say that you have worked for other companies, have you usually worked in round-houses?

A. Both in roundhouses and repair shops. [75]

Q. Now, in Seattle—

Mr. Sharp: —If the Court please, I think that if he is going to interrogate him as to custom he will have to have a better foundation.

The Court: I don't know what he is going to ask yet. Go ahead, Mr. Glasby.

Q. What equipment was provided in some of these other shops for your work?

A. You mean for that same type of work?

Q. On engines, high on engines?

A. Wherever you worked high on engines they have scaffolding,—a job of this type, of course, didn't use a scaffolding because it wasn't big enough

(Testimony of H. C. Hartman.)

to put up the scaffolding, in fact it would be in the way if you did have it.

Q. Have you done work in these other shops on front ends of this type of engine?

A. Well, similar to that but not this particular type.

Q. And did you use a scaffolding for work high on those?

A. Not this type of work that we were doing at this time, no, sir.

Q. Working on these doors, that is, where the doors happen to be taken off for cleaning, how was that done in these other shops?

A. Taking off the doors on the front end, they have cranes, they take them off with cranes. [76]

Q. And then what did you stand on to work?

A. They put a permanent stage there to stand on, they have a proper staging for you.

Q. Did they have a proper staging at St. Maries? A. No.

Q. Did they have anything at all in the way of staging?

A. Not that you could use there, no.

Q. Did they have any way to build scaffolding at all around there? A. In St. Maries?

Q. Yes.

A. We had a makeshift scaffolding, the planks were pretty well shot that we used to wash the front end of the engines there.

Q. You say the planks were pretty well shot, were they in good condition?

(Testimony of H. C. Hartman.)

A. No, they were not.

Q. What would you say would be a safe method for a green hand to do this type of work that Jim was doing that day?

A. For that type of work he would have to use his own judgment as to how he would get up there and hang on, he would have to use his own judgment for his own safety.

Q. They didn't have anything around there for him to use, is that right?

A. No, they didn't. [77]

Mr. Sharp: I think that these questions are leading.

The Court: The witness has already testified that they didn't use any scaffolding on a job of that kind, so I don't see how scaffolding would have anything to do with this matter at all, it seems to me that all this is immaterial.

Mr. Glasby: I think that is all.

Cross Examination

Q. (By Mr. Sharp): Mr. Hartman, you testified that you had a helper until about 1949 and that he was laid off, why was that?

A. I didn't hear the question.

Q. You testified that you had a helper until about 1949 and that he laid off or was laid off, why was that?

A. They were reducing the force, there wasn't enough work.

Q. In other words, the amount of work that

(Testimony of H. C. Hartman.)

went through that roundhouse was cut down, is that right? A. That is right.

Q. Did you have enough work to keep you busy?

A. No, I wasn't always busy myself.

Q. Now, this particular job that you were doing on that day, I believe that you testified that it was a rather simple job, is that what you said? [78]

A. Yes, it was, all that you had to do was tighten up three-quarter inch nuts.

Q. Tighten up three-quarter inch nuts with an open wrench, is that right?

A. That's right.

Q. Had you ever done that job yourself?

A. Yes, sir.

Q. Throughout these 32 years of experience I presume you have done it a good many times, is that right? A. Yes.

Q. I think that you testified, Mr. Hartman, that there was an eight by eighteen inch plate to stand on up there, was that what you said?

A. About 18 inches long and six or eight inches wide.

Q. And that was to stand on while you were working? A. That is right.

Q. And you say there was no scaffolding because the job wasn't big enough, is that right?

A. That right.

Q. What type of engine was this that you were working on? A. A C 1200 type.

Q. Was that a small engine?

(Testimony of H. C. Hartman.)

A. Yes, sir.

Q. And you say scaffolding or staging would have been in the way, is that right? [79]

A. That's right.

Q. I believe you stated that you were watching him up there, did you see any injury?

A. I didn't see anything.

Q. All you know is what he told you when he got down? A. Yes.

Q. And what did he say?

A. He said he got a kink in his back.

Q. And do you recall if he came to work the next day? A. I am pretty sure he did.

Q. And do you recall if he said anything more to you about it after he came back to work?

A. No.

Q. Do you mean no, he didn't say anything or do you mean that you don't recall?

A. I don't understand.

Q. Did he say anything more about his back after he came back to work the next day?

A. No, not to me, no, sir.

Q. And you worked with him after that, did you?

A. Off and on when I needed him, I was right there in the roundhouse with him.

Q. And this particular roundhouse, as operations go, is a pretty small one, isn't it?

A. Yes, it is. [80]

Q. In 1950, about how many men were working a shift in that roundhouse?

(Testimony of H. C. Hartman.)

A. The day shift had the most, they had about six or seven.

Q. Six or seven on a shift?

A. On the day shift, they had the most.

Q. The three-quarter inch wrench, is that the usual type of wrench to be used for that job?

A. Yes, he was using the proper wrench.

Q. It was the proper tool to tighten those nuts?

A. Yes, it was.

Q. And there was nothing defective about that tool, is that correct?

A. There was nothing defective.

Q. You were watching while he did the job,—did anything slip or did he fall or was there anything unusual there?

A. Nothing unusual at all.

Q. And you would not have known that there was anything unusual except that except that when he got down he mentioned the kink in his back?

A. That is right.

Q. Had he ever mentioned anything about going to a chiropractor to you?

Mr. Glasby: We object to that as immaterial and it would be pure hearsay.

The Court: I will let him answer. [81]

Q. Do you recall him mentioning anything to you about going to a chiropractor?

A. He told me that he was going to a chiropractor, yes, he told me several times.

Q. Do you recall, was that before or after this incident?

(Testimony of H. C. Hartman.)

A. I wouldn't say which it was, no.

Q. Do you ever remember him complaining about his back when he came back to work in 1949?

A. No, I can't remember it now.

Q. You can't recall whether he did or did not?

A. No.

Mr. Sharp: That's all the questions I have.

Mr. Glasby: I believe that is all.

BERNARD M. SORENSON

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you acquainted with the plaintiff?

A. He worked down at the boiler room off and on.

Q. When was that?

A. I think it was back in 1947.

Q. Do you know his ability as a worker?

A. He was pretty good, he wouldn't be able to do it if he [82] wasn't any good.

Q. It was hard work that you were doing, was it?

A. It was firing a furnace, and it was hard, I was in there for 27 years and I was supposed to know.

Q. And you would know whether a man was a good worker or not? A. Of course.

Q. And you considered him to be a good worker?

(Testimony of Bernard M. Sorenson.)

A. He was a good worker, yes, sir.

Mr. Sharp: We have wasted a good deal of time on this finding out whether he was a good worker or not and I don't see where it has anything to do with this case.

The Court: I fail to see that myself, but maybe we would like to know what kind of a worker he was.

Mr. Sharp: I will concede that he was a good worker.

The Court: It really doesn't have anything to do with this case.

Mr. Glasby: That was the purpose of calling this witness, to show that he was a good worker.

The Court: Then if that was the purpose I think you might as well excuse the witness.

Mr. Glasby: That is all. [83]

The Court: You may step down. You did not have any cross examination?

Mr. Sharp: No, no cross.

LEONA NITCY

called as a witness for the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you any relation to the plaintiff in this action?

A. I am his wife.

Q. When were you married?

A. In April of 1929.

(Testimony of Leona Nitey.)

Q. Do you have any children?

A. Three boys.

Q. And what is the age of those boys?

A. The oldest one is 23, the second one is 18 and the little one is 12.

Q. Do you keep any records for the family?

A. I try to do the best I can at that.

Q. Have you kept any record of Jim's work?

A. Yes, sir.

Q. Do you keep a record of the money you have on hand?

A. I did when we had some money.

Q. Do you have any money now?

A. No, sir. [84]

Q. How are you surviving?

A. Well, our 18 year old boy is working now.

Q. And that is the way you are getting by?

A. Yes, sir.

Q. Do you have those records in court with you?

Mr. Sharp: I assume that this has something to do with the loss of earnings, and how the family is living, otherwise, of course, I don't think it would be material in any manner, that is, as to how the family is living I don't believe is material in this matter at all. If there are certain records that are brought in, of course, we will have to meet that when the records come.

The Court: Yes, I will instruct the jury at this time. You are to disregard any testimony of this witness in regard to not having any money or things of that kind. It is immaterial here. I know

(Testimony of Leona Nitcy.)

that it is a serious thing for a person not to have any money but this case, of course, has to be tried on the evidence and not on a matter of sympathy or any condition that she might be in or the family might be in. Of course, you may show his earnings and so forth. You may proceed.

Q. Do you have a record of his earnings in the courtroom here?

A. Well, yes, I do, while he was working. [85]

The Court: I am wondering if we couldn't save a great deal of time if we would take a short recess at this time and counsel get together on these figures and then perhaps stipulate as to the earnings.

Mr. Sharp: We will be glad to do that, your Honor.

Mr. Glasby: Yes, I think we can.

The Court: It will save a lot of time and we will take a five minute recess at this time.

October 26, 1953, 3:00 p.m.

Mr. Glasby: Counsel has stipulated that the man's wages, Mr. Nitcy's wages, were approximately \$230.00 per month while he was working for the Milwaukee. That would largely be the purpose of this witness testifying, except that I would like to have the right to call her in rebuttal if I find it necessary.

The Court: Yes, of course, you may do that.

DR. BERGAN RAFF

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): What is your occupation?

A. Physician.

Mr. Sharp: We will admit the Doctor's qualifications.

Mr. Glasby: Thank you.

Q. Are you acquainted with Mr. Nitey?

A. Yes, I am.

Q. When was the first time that you ever treated him?

A. It was during 1948, when he was employed by the St. Maries Lumber Company.

Q. And what did you treat him for?

A. Oh, various respiratory infections, as I recall he received shots for cold.

Q. And when was the next time?

A. That was on October 24, 1950, at which time he was working at the roundhouse of the Milwaukee Railroad.

Q. And you didn't see him between 1948 and 1950?

A. Yes, I did, I saw him in 1949 but I believe that was also on these other matters, while he was with the Lumber Company. This is the first notation I have when he was employed by the Milwaukee.

Q. And you didn't see him until October, 1950?

A. That is right.

(Testimony of Dr. Bergan Raff.)

Q. Dr. Raff, did you ever take any X-ray of this man? A. Yes, I did.

Q. Do you have those with you?

A. Yes, I took one view of the pelvis. [87]

Q. Will you tell me what date that was taken, please?

A. This was on February 14, 1950.

Q. Did I understand then, Doctor, that you did not treat him between '49 and October, 1950?

A. Well, the first notation on the chart is October 24, 1950.

Q. But the X-ray shows that it was taken on February of 1950? A. That's right.

Q. And you don't recall treating him in February of 1950? A. Yes, I do.

Q. Then the other statement was wrong?

A. Well, I have a notation here, October 24, 1950, sciatica.

Q. And what is sciatica?

A. Well, that was pain in the leg and the back and in this case it was going down his left leg.

Q. And what date was that you spoke of?

A. October 24, 1950.

Q. Do you know for what purpose the X-ray was taken that you spoke of?

A. Well, he saw me in February for this same matter, with the back pain.

Q. And what treatment did you give him?

A. He received some injections of a substance called procystine, that was before the era of corti-

(Testimony of Dr. Bergan Raff.)

zone, and he also received [88] some diathermy treatment.

Q. That is heat treatment, is it? A. Yes.

Q. And what was the purpose of these shots, Doctor?

A. The X-ray showed a bony spur on the vertebra which I presumed to be due to arthritis,—which is due to arthritis.

Q. And that was treatment for that condition?

A. Yes, that is right.

Q. And was that the only treatment that you gave him? A. Yes.

Q. What does your X-ray show, Doctor?

A. As I mentioned, it showed a normal pelvis and vertebra except for one vertebra which had a small spur, a small sharp spur, and as far as spurs go I would say it was a very mild inflammation.

Q. And that is the only evidence that you discovered?

A. Yes, I will say, however, this is just an anterior posterior view, a lateral view wasn't taken because I didn't feel that it was indicated at that time.

Q. And did you treat him constantly from February on?

A. Several times, I don't recall how often in March, however, I saw him a year later, in October of 1951, also in July of 1951 he came in and wished to be referred to Dr. Peacock, another physician employed by the Milwaukee [89] Hospital Associa-

(Testimony of Dr. Bergan Raff.)

tion. I did not treat him then, I just gave him a referral slip.

Q. And what was his complaint in 1950?

A. Back pain.

Q. And did he give you a history of the cause of it?

A. At that time he didn't. I wrote a letter about a year later in which I stated that no history was given me at the time of the initial visit. As a matter of fact we always make an injury report for the Railroad Company and none was made in Jim's case.

Q. You didn't make one? A. No.

Q. Did he tell you that he had been injured?

A. No, he did not.

Q. Did you know that he was working on the railroad? A. Yes, I did.

Q. Did you have any position with the railroad?

A. Yes, I was district surgeon at that time, and the other doctor with me was the local surgeon.

Q. At what time was that?

A. February, 1950.

Q. You were district surgeon at that time?

A. Yes, sir.

Q. How long did you remain as district surgeon?

A. About two years, I had been local surgeon since 1947.

Q. Until when? [90]

A. I cannot tell exactly the dates,—I will take

(Testimony of Dr. Bergan Raff.)

that back, I didn't become district surgeon until April of 1950.

Q. And who was the district surgeon?

A. At that time it would have been Dr. Mosley.

Q. Now, in your job there with the railroad, were you hired to treat employees of the Milwaukee? A. Yes.

Q. And who was to pay for this?

A. The Milwaukee Hospital Association paid us a salary each month, a fixed amount, and that took care of all our professional work.

Q. Did you also charge the patient in addition to that? A. No, we did not.

Q. Did you charge Mr. Nitey?

A. I did not.

Q. And you didn't charge him at any time?

A. That is right.

Q. In February or October?

A. No, sir, I did not. As a matter of fact, when he was working for the St. Maries Lumber Company he was also under a hospital contract and he was not charged at that time except his monthly dues of a dollar and fifty cents.

Q. And in February of 1950 nor at any time after that did he pay you any fee? [91]

A. That is right.

Q. And you were treating him as a Milwaukee patient? A. That is right.

Q. Did he have any evidence of injury in February of 1950?

A. No, sir, he did not.

(Testimony of Dr. Bergan Raff.)

Q. Did he tell you that he was injured?

A. No, there was no history of any injury at that time.

Q. What did he say was the matter with his back?

A. That it just came on while he was working.

Q. Then you knew that this trouble arose while he was working? A. Yes.

Q. Now, Doctor, was there any duty on your part to report these injuries or illness that arose while these workmen were on the job working?

A. No, there has to be a specific incident. A man could have a coronary thrombosis on the job and that would not be a reportable condition.

Q. And what does that have to do with this condition? A. Nothing.

Q. That has to do with a heart condition?

A. That is right, I just used that as an example.

Q. If a man dropped dead of heart trouble on the job then you would not have to report that to the Milwaukee?

A. Not as an injury, that is right.

Q. Did you have to report it at all? [92]

A. Yes, we have a monthly report where we report all sickness and injury.

Q. And did you report that as to Mr. Nitcy's condition?

A. Yes, he is on the monthly report.

Q. And for what period?

A. I cannot say without looking at the report

(Testimony of Dr. Bergan Raff.)

but I am sure it must be for the months that we are talking about.

Q. Where are those copies?

A. I believe that they are over there at that table (indicating).

Q. Dr. Raff, did I understand you to say that in February he complained of back trouble?

A. Yes.

Q. As I understand it, Doctor, these are the records that you send in? A. Yes.

Q. Will you look at that and tell us, if you please, what you diagnosed the trouble as at that time?

A. Apparently he was suffering from a cold at that time.

Q. You say he complained of his back. Is there any connection between a cold and a back pain?

A. No, there isn't.

Q. What treatment did you give Mr. Nitey?

A. For the back trouble? [93]

Q. For anything?

A. He has had those injections that I told you about for his back.

Q. Is that vitamins?

A. No, those are non-specific proteins, a sulphur compound.

Q. Does that have any pain killing qualities?

A. No.

Q. And diathermy, that is a heat treatment?

A. Yes.

Mr. Glasby: I think that is all.

(Testimony of Dr. Bergan Raff.)

Cross Examination

Q. (By Mr. Sharp): Doctor Raff, you have stated that you were district surgeon for the Milwaukee Hospital Association in 1949 and 1950?

A. Yes, but I believe that it was of April 1st of 1950.

Q. Doctor, will you tell me about this association,—supposing that an employee has a cold or neuralgia or some other such condition, does the Milwaukee Hospital Association take care of that?

A. Yes, sir.

Q. And is that free of charge?

A. Yes, it is, except for the monthly dues.

Q. Is it a contract arrangement between the Milwaukee Railroad and the Hospital Association, is that the way [94] it works?

A. Yes sir, that's right.

Q. And it is set up for the benefit of the employees?

A. Yes, sir.

Q. And the men make certain contributions, do they?

A. Yes.

Q. Out of their monthly checks?

A. Yes.

Q. And they know when they receive their checks that they are making this contribution?

A. Yes.

Q. And you treat those people, the employees, not only for industrial cases, but for any condition, is that true?

A. That is true.

Q. If a man is working in the St. Maries round-house and he wants to be treated, what does he do?

(Testimony of Dr. Bergan Raff.)

A. The usual procedure is to go to the supervisor, in that case it would be his foreman, and obtain a hospital slip, that is a green slip and it is signed by the foreman and the man presents it at the hospital and his name is registered in a separate book at the office of the hospital, separate from the private patients. We do that because there are no charges made for these patients and we keep that to make up these monthly reports.

Q. You say that book is kept to make out these monthly reports? [95] A. That is right.

Q. Is that one of the reports that you were talking about? A. Yes.

Q. The one you have there? A. Yes.

Q. What month is that?

A. This is for December, 1949.

Q. Does that report show that Mr. Nitey availed himself of the Milwaukee Association,—the Hospital Association?

A. Yes, on the 28th of December, and the diagnosis is bronchitis, it shows he had one office call.

Q. And that was December, '49?

A. Correct.

Q. Now, Doctor, will you tell us what that report is which you have?

A. This is February, 1950.

Q. And does Mr. Nitey appear on that report?

A. Yes, he was in once for a cold.

Q. I think that on direct examination you mentioned that there was an X-ray taken of the back of this man in February of 1950 and yet on that

(Testimony of Dr. Bergan Raff.)

form it says a cold. Does that mean that a man might come up for a cold and also complain of something else while he was there?

A. It is possible, yes.

Q. If a man came in and if he had three or four complaints, [96] would you put all three or four of them down?

A. Usually, however, these diagnosis are picked up by the office girl from the book and she may have asked what he had or something like that and she may have just jotted the one down.

Q. So that when a man comes in he tells what is the matter and the nurse puts that down in the book and then the book is used to make the report, is that right?

A. That is right.

Q. And it says cold on that one?

A. Yes.

Q. And that means that the man was complaining of having a cold?

A. That's right, there must have been some reason for that, of course, it is possible that we may have missed him during that month but I don't think so. This was taken, that is the X-ray, on the 14th of February.

Q. Did you take any other X-ray on that date?

A. No, this is another X-ray taken on the 16th of March, 1951.

Q. That one that you had out there, you mentioned on there or noted on there, I believe, arthritic spur?

A. That's right.

Q. Perhaps, Doctor, you could show the jury

(Testimony of Dr. Bergan Raff.)

that condition, that arthritic condition you mentioned?

Mr. Glasby: May I look at that? [97]

The Court: I thought you had him testify from this exhibit, didn't you look at it?

Mr. Glasby: No, sir, I did not.

The Court: Then we will take time, you may always look at the exhibits.

A. This is a normal outline of a vertebral body, there are many of these bodies in the spine. In a normal vertebra this has a rounded edge, down here on the fifth vertebra you can see a sharp point, that is the spur. In this entire vertebra or this view of the vertebra that was the only pathology that I could see, however, I am not an X-ray man but to my knowledge I would call that a normal X-ray except for that bony spur. As I said before, that is what we would call a minimal involvement in a moderate or severe case, every corner would show a sharp spur and sometimes a bony growth across here (indicating). Another sign of arthritis, here (indicating) in the sacroiliac joint, where the hip bone joins the spine or hooks on to the spine and if they are infected with arthritis they sometimes fuse across here and you would see a white line instead of a dark space. I would say this shows up as a normal joint.

Q. That arthritic condition which you spoke of, would that spur grow on there in a period of four days?

A. No, certainly not. That would be a pre-exist-

(Testimony of Dr. Bergan Raff.)

ing thing, [98] I would say, for at least a year, it would be hard to judge that.

Q. Is that type of thing fairly common?

A. These are often found in other X-ray examinations, we will find these spurs quite frequently if we take an X-ray for a stomach or chest ailment or examination we may find the spine loaded with these spurs and the patient has no complaints to make, they are often co-incidental.

Q. Did you bring this to the attention to Mr. Nitcy?

A. I told him that he had arthritis and that was the purpose of the shots and the heat treatment.

Q. Did he know that he had arthritis, did he mention that to you?

A. Well, yes, a year later when he came back he said that everyone else had told him the same thing. He told me that he had seen several chiropractors and in fact that he had had a complete work up by Dr. Langer in Spokane.

Q. Then when he was in to see you, on February 14, he did not complain of any injury to his back?

A. No, that is right.

Q. There is something I think should be cleared up, Doctor, I believe you in answer to questions by Mr. Glasby said that you knew the condition came on while he was working, do you mean that just in the same way that a cold might [99] come on while a person was working, I believe you mentioned coronary thrombosis or something?

A. Yes, that is right, he gave no history of any

(Testimony of Dr. Bergan Raff.)

definite injury but that it came on while he was doing his normal job.

Q. And you reported it in the monthly report, is that right? A. That's right.

Q. You mentioned December, 1949, will you look at May of 1950,—I will just give you all of these reports and will you just go through these months and tell us the nature of any injuries during that time?

A. You mean to Mr. Nitcy or all injuries?

Q. Yes, to Mr. Nitcy?

A. February of 1950, that is the one I had, where I diagnosed it as a cold. June of 1950, cold again. May of 1950, upper respiratory infection, another cold. October of 1950, a diagnosis of lumbago, that is a back complaint.

Q. Now, October of 1950, that is the first time that this back shows up in this man's report, or his medical slips,—lumbago, what does that mean, Doctor?

A. Actually, it is a painful back due to muscle spasm. It is a very poor term, it is not specific, it can be caused by chilling of the muscle itself, we have heard of people mention cold in the back and it can be caused by [100] arthritis, when these spurs cause a pressure on the nerve and throws the muscle into spasm, and there are other causes too.

Q. And would you, from looking at these reports, Doctor, would you say the man did not complain through October of 1950 of any injuries?

(Testimony of Dr. Bergan Raff.)

A. That is true.

Q. And he did not pay his own way, he was taken care of by the railroad and by the Milwaukee Hospital Association?

A. That is correct.

Q. And he has a history from December of '49 of using the facilities of the Milwaukee Hospital Association?

A. Yes, sir.

Q. You mentioned diagnosis, now then, Doctor, by diagnosis you mean that is what the men tell the nurse when they come in with a slip. Would you just go over the report and list in one month, just list the diagnosis given there for six or seven men so that we can see how carefully it was taken care of there?

Mr. Glasby: I cannot see where that has anything to do with this case.

The Court: I think that is true, but we have had so much here that has nothing to do with this case that I think now we might as well get it all.

Q. What month do you have before you, Doctor? [101]

A. I have October of 1950.

Q. And there is a column on there that says nature of illness or sickness?

A. That is correct.

Q. Will you tell us what that shows?

A. The first one is fractured ribs, the next is injury to the left flank, that is a very non technical diagnosis. The next is hypertension, sinusitis, bruised finger, gall bladder, sinus infection—

Q. —I think that is sufficient, Doctor.

(Testimony of Dr. Bergan Raff.)

A. Very well.

Q. Doctor, did you testify that if a man comes in and complains of an accident or injury on the job that a report is made of that?

A. Yes, sir.

Q. A special report? A. Yes, sir.

Q. A different kind of report?

A. Yes, an injury report, I cannot tell you the number of it now but it is a green sheet.

Q. And you have searched your records, have you, for this?

A. Yes, I don't believe that we have any for Mr. Nitey.

Q. In 1950 when you first talked to Mr. Nitey about this cold condition and some mention was made of his back, and also you took an X-ray, did he seem aware of the fact that he [102] had a back condition?

A. Yes, he knew that he was having back trouble.

Q. Did he give you any history or any record of having gone to chiropractors and so on for that condition?

A. He didn't mention who but he did mention several chiropractors and he also did mention by name Dr. Langer of Spokane.

Q. That was in February? A. Yes, sir.

Mr. Glasby: I want to interpose this further objection, I would like to know when these things all happened.

(Testimony of Dr. Bergan Raff.)

The Court: I think he said that this was in February.

A. In February of 1950 and I believe that the mention of Dr. Langer was in July of 1951.

Q. That was later?

A. Yes, sir, and he also mentioned this referral to Dr. Peacock.

Q. This Dr. Langer, is he an M. D.?

A. He is a neuro surgeon. He did certain X-ray studies where they inject dye into the spinal canal to determine whether or not there are displaced discs, any ruptured discs. Those are small cushions between the vertebra and sometimes they come out of position and cause pain, back aches and leg [103] pains, however those studies were negative.

Q. As I understand it, you referred him to Dr. Peacock? A. That's right.

Q. And he is also an Association doctor?

A. Yes, sir.

Q. And did you also refer him to Dr. Dupree?

A. Yes,—I think that Dr. Peacock made the arrangement with Dr. Dupree.

Q. And that is all at the railroad expense?

A. Yes, sir.

Mr. Sharp: I think that is all, Doctor Raff, thank you.

Redirect Examination

Q. (By Mr. Glasby): Would this spur that you mentioned disable the man?

A. If it was in the right location it could give

(Testimony of Dr. Bergan Raff.)

trouble, it might cause some leg pain but I would not say it would be completely disabling.

Mr. Glasby: I would like to have those X-rays entered in evidence.

The Court: They may be marked and admitted.

Mr. Glasby: Nothing further.

Mr. Sharp: I have nothing more. [104]

THOMAS MOUTRAY

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you acquainted with the plaintiff, Jim Nitey?

A. Yes, he worked with me lots of times.

Q. Do you remember when he worked on the railroad? A. Yes, sir.

Q. Did he work on the railroad just one time?

A. Two times. He quit once and Mr. Stranberg took him back, he was a good worker, he said he was one of the best men he had to do this cleaning.

Q. And you say that was the second time then?

A. Yes, the second time.

Q. How long did you work on the railroad?

A. Oh, 23 or 25 years.

Q. 25 years?

A. 23 or 25 and part of that time was for the government.

Q. Have you ever worked for any other company besides the Milwaukee?

(Testimony of Thomas Moutray.)

A. Yes, the Great Northern, the Northern Pacific, the Union Pacific and the Milwaukee and also on a government railroad in Alaska.

Q. What kind of work did you do? [105]

A. Machinist.

Q. In the roundhouse and shop?

A. In the back shop or anywhere.

Q. Did you have to work up high on engines?

A. Yes, lots of times.

Q. In other shops how was that work done?

Mr. Sharp: If he is going to testify about work done in some other shop or some distant shop than this, he would have to lay a foundation as to the type of shop, the size of the engines and what kind of work he did. We object to this as immaterial, incompetent and irrelevant.

The Court: The objection is sustained.

Q. Are you familiar with what is called a C class engine? A. Yes, the 1200 type.

Q. Have you worked on engines similar to the class C that the Milwaukee has?

A. Yes, sir, I have worked on them.

Q. And did you say you had worked in roundhouses?

A. Yes, sir, and in back shops, too.

Q. Have you worked in roundhouses similar to the roundhouse in St. Maries?

A. Yes, sir, I worked at Wenatchee, Washington, and it is similar to that.

Q. Are you familiar with the St. Maries roundhouse? [106]

(Testimony of Thomas Moutray.)

A. I know the St. Maries roundhouse, I worked there.

Q. I see, you worked there?

A. Yes, for eight years.

Q. And these other roundhouses that you mentioned, did you have occasion to work high and on C type engines?

A. Yes, sometimes on top of the bell ringer, sometimes you have to go up and tighten about the smoke stack on some engines.

Q. And what equipment would you use when you worked high on those engines?

A. Well, they go about just like a painter and put a scaffold up for you to get up there with, down there we had a hard time even packing a pump, you have to use a ladder.

Q. Where is that?

A. That is at St. Maries.

Q. You don't have the equipment at St. Maries, is that right?

Mr. Sharp: If the Court please, I don't think that the proper foundation has been laid for this sort of questioning, this man has testified about packing pumps, and so on, and they are different kinds of work at different places and I object to this as being immaterial to the issues here and I don't think any foundation has been properly laid. I also think this sort of examination is misleading.

The Court: Of course, the work involved here was at the roundhouse at St. Maries and done under the conditions as they existed there. I don't think

(Testimony of Thomas Moutray.)

that the foundation has been properly laid for such examination as you are conducting.

Q. Did I understand you to say that you have worked for other companies in roundhouses and shops that are in the same status as the St. Maries roundhouse?

A. I worked for the Great Northern in a similar roundhouse, they run out to Oroville and another branch to Waterville out of Wenatchee and, of course, we would get the main liners there too if something went wrong with them and I worked on them,—it was just about the same thing. There were some tools down there that I had to buy for myself because they didn't have them.

Mr. Sharp: I am sorry, Mr. Glasby, I don't like to interrupt you too much but I must keep this record straight and clear. I wonder if my same objection could go to this testimony. This testimony now goes to work on the Great Northern and about a roundhouse and this place or that place and that seems to be the only foundation laid here.

Mr. Glasby: It has also been brought out, your Honor, that he worked on similar engines and [108] in roundhouses and shops that were similar.

The Court: But, Mr. Glasby, your own witness has testified that the conditions at the St. Maries roundhouse were different, that they didn't require and in fact that they would not justify the putting up of a scaffold.

Mr. Glasby: Of course, I want to bring out the

(Testimony of Thomas Moutray.)

facts that these matters,—these things should have been supplied. I have alleged that they didn't supply this man with the proper equipment.

The Court: Just in order to shorten this matter up I will permit you to ask this man whether or not in his opinion proper equipment was furnished and used at the St. Maries roundhouse.

Q. Mr. Moutray, in your opinion, was proper equipment supplied and furnished for working high on engines at the St. Maries roundhouse?

A. In some places it was all right, you could get at them, and again in some places it wasn't.

Q. Did they have proper equipment to get at it at St. Maries?

A. Well, I will tell you, some people,—let me say I had a helper and when it came to five days a week,—

Q. —That does not answer my question, Mr. Moutray, I just want to find out if they supplied proper equipment for [109] working high on engines at St. Maries, at the St. Maries Milwaukee roundhouse?

A. No. I tell you, one time I was there and a pipe burst—

The Court: —In view of the objection heretofore made I will have to sustain it here, this testimony is entirely immaterial. After all, this record might be reviewed by a higher court and I don't want to seem too ridiculous.

Mr. Sharp: I was about to renew my objection but I presume that is not necessary.

(Testimony of Thomas Moutray.)

The Court: No, I thought I should stop this myself.

Q. Now, I will ask you to answer this question yes or no. Do you think that the equipment at the roundhouse at St. Maries was proper equipment for working high on engines?

A. I don't think so.

Q. You don't think so? A. No.

Mr. Glasby: That is all, you may examine.

Cross Examination

Mr. Sharp: Before I start any examination I would like to ask that the answer be [110] stricken to that last question. I don't believe it is material and I don't believe there is any qualification shown and there was no foundation laid for such a question.

The Court: The answer may be stricken.

Mr. Sharp: Then I have no questions.

HERBERT MARQUETTE

being called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you acquainted with the plaintiff, Mr. Nitcy?

A. I have worked with him.

Q. Have you worked on the Milwaukee Railroad? A. Yes, sir.

Q. Where did you work? A. St. Maries.

(Testimony of Herbert Marquette.)

Q. For how long a time?

A. Eight years and a half.

Q. Did you know Mr. Nitcy during that time?

A. He was my helper.

Q. What was he doing?

A. Servicing engines, greasing them, wiping them, cleaning them up, putting water and oil in them.

Q. Did you know Mr. Nitcy prior to February 10, 1950? [111] A. Yes, sir.

Q. What was the quality of his work?

A. His work was number one.

Q. Did you know him after February 10, 1950?

A. Yes.

Q. Did you observe his work after that time?

A. He never worked after that time with me.

Q. Did you see him working at the roundhouse after that time? A. In 1950, you mean?

Q. Yes.

A. Yes, sir, we used to meet in the morning when he worked there.

Q. Do you know whether he was able to handle all of the heavy work around there after February 10, 1950?

Mr. Sharp: I wonder if this man has testified that he worked there after that date.

The Court: All he has testified to was that Mr. Nitcy did not work with him after that date.

A. No, he wasn't there with me, he worked there all right but he didn't work with me, he worked nights a part of the time and I worked days.

(Testimony of Herbert Marquette.)

Mr. Sharp: Then I move to strike the answer. Certainly this man is not qualified to answer that question. [112]

The Court: It may be stricken.

Mr. Glasby: No further questions.

Mr. Sharp: No questions.

ROBERT E. GRANVILL

being called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Have you ever worked at the St. Maries roundhouse? A. Yes, sir.

Q. Are you acquainted with Mr. Nitcy, the plaintiff here? A. Yes, sir.

Q. How long have you known him?

A. About three years, I knew him ever since he came to work there.

Q. Do you know whether he was ever injured while working there?

A. Well, I don't know, I never saw him injured, —I heard that he was.

Mr. Sharp: I must ask to strike that answer——

The Court: ——Yes, the last part of the answer may be stricken "I heard that he was".

Q. Did you ever have a conversation with Mr. Nitcy in the year 1950? [113]

A. Yes, if he worked there I did because he worked with me.

(Testimony of Robert E. Granvill.)

Q. Did he ever discuss anything about injuries at that time?

Mr. Sharp: Once again, if the Court please, I must object to this because——

The Court: ——Yes, that objection will be sustained. It would be entirely self serving.

Q. Are you acquainted with Harry Bogardis?

A. Yes, sir.

Q. Were you acquainted with him in 1950?

A. Yes, sir.

Q. Where was he working then?

A. He was stationary fireman in the round-house at St. Maries.

Q. Have you worked with him or for him?

A. Yes.

Q. Is he the type of man that was willing to help his fellow servants?

Mr. Sharp: Now, I must object again, this is so evident that it is immaterial. Here he is inquiring about another employee entirely——

The Court: ——Yes, I don't want to get involved in the trial of any other party here, let's get through with this one. The objection to that will be sustained.

Mr. Glasby: That will be all.

Mr. Sharp: I have no questions. [114]

The Court: Now, Mr. Glasby, you have only one other witness, I believe, and that is the Doctor.

Mr. Glasby: That is right.

The Court: Can you have your doctor here at 10 o'clock tomorrow morning?

Mr. Glasby: I feel sure that I can.

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

October 27, 1953, 10:00 a.m.

Mr. Glasby: If the Court please, counsel for the railroad company and I have agreed to stipulate that this man was born in November, 1897, making him one month short of 54 years of age on October 1st, 1951. Presently he would be 56 and would turn 57 his next birthday.

The Court: Have you figured out what the life expectancy is?

Mr. Glasby: I am unable to get a stipulation on that. We tentatively agreed for a stipulation on it but I do have the Idaho code here.

The Court: What does it figure out according to the Idaho code?

Mr. Glasby: Under the American annuitance, of age 53, it would be under the ultimate, 19.8 and under [115] the select it would be 20.26. At the age of 54 it would be 19.29 under the ultimate and 19.58 under the select. Under the standard annuity table at the age of 53 it would give him a life expectancy of 22.45 years and at the age of 54 he would have a life expectancy of 21.75.

Mr. Sharp: My position in refusing to stipulate on those figures is on the basis of what has gone in I figure it is not pertinent. I have heard nothing to the effect that the man is permanently disabled, there is nothing in this record concerning perma-

nent disability. It seems to me that this would be misleading.

The Court: I will take this under consideration and will rule on this matter before I instruct the jury, however, you have stipulated as to his age.

Mr. Sharp: I think that is right.

Mr. Glasby: It seems that I am having doctor trouble, I thought that Dr. Miller would be here and perhaps he had gone to the County Court House but I called there and he has not been there. I understood from Spokane that he would be here at 10 this morning. My case is all in with the exception of Dr. Miller. I thought perhaps we could rest with the permission of the Court to put Dr. Miller on when he does get here [116] and let the defendant go ahead with its case at this time.

The Court: I think that I will let the jury retire for a few minutes.

(The following proceedings had in the absence of the jury.)

The Court: It would be somewhat of an irregular procedure but it has occurred to me that no doubt the defendant had a motion to make at the time you rested and if your case is rested now, that is, with the exception of this one doctor's testimony, we might go into the question involved here in connection with the motion to strike which I left open by my other ruling as to certain matters in the complaint and I thought that we might dispose of that, that is, I may only hear the argument on it but we could go that far. We can save some

time, I am sure. Do you understand what I mean?

Mr. Glasby: Yes, I do.

Mr. Sharp: Yes, your Honor, and I want to renew my motion and I could argue that. I also want to make a motion at the close of the plaintiff's case for dismissal or an instructed verdict.

The Court: Of course, I want to handle this correctly, it would not do to allow the [117] plaintiff to try and correct something that may come up in the argument by calling other witnesses and I would want that understood.

Mr. Sharp: If it please the Court, I do hesitate to make my motion before the plaintiff has rested.

The Court: Yes, I understand, we will wait. I just thought we might save a little time. I dislike very much to have delays like this one, we have juries here and trying cases of this kind are expensive and I dislike to have these delays.

Mr. Sharp: As to my motion to strike I really don't have anything more than I had in my brief.

The Court: That is all right, I understood that you wanted to renew that motion.

Mr. Sharp: Yes, I should like the record to show that that motion is renewed.

The Court: I will consider that.

Mr. Sharp: That motion is as to Sections 1 to 50 of the Safety Appliance and Boiler Inspection Acts.

The Court: If there is any doubt in the record now this motion may be considered renewed at this time. What do you have to say about it? [118]

Mr. Glasby: I am unable to supply the Court

with any authorities on my position concerning this Act.

The Court: I am sure from the investigation that I have made that the motion should be granted and it will be granted as to that section of the Statute. This eliminates all matters in this complaint except the first count. Whether it comes within the Statute or not there is no evidence to support any allegation of the complaint except the first three and I expect to hear from you later with respect to them and with respect to that phase of the case. Number 1, 2 and 3 alleged in Paragraph 4 of the complaint is all that is left of the complaint at this time.

In the interest of time and in order to save any further delay the defendant has stipulated with the plaintiff that if Dr. Richard C. Miller was here on the witness stand he would testify to the fact that he had reviewed the record of September, 1949, and that there was no evidence of anything wrong with plaintiff's spine at that time. There was no charge for this information, that is what the doctor,—Dr. Miller wrote Mr. Nitcy. The defendant is only admitting that the doctor would testify to that if [119] he was present and he is not making any admission as to the truth of the statement. The letter may be marked and admitted. Is there anything further, Mr. Glasby?

Mr. Glasby: The plaintiff rests.

Mr. Sharp: At this time I would like to renew my motion to dismiss.

The Court: I am going to excuse the jury until

1:00 o'clock this afternoon. I used language that was a little broad in making my ruling on the motion to strike. I only intended to strike those acts charged against the defendant in Paragraphs 5, 6 and 7 and not, of course, strike the allegations of 8 and 9. It sounded as if I had eliminated the entire complaint. I will hear your motion now.

Mr. Sharp: My motion, of course, is a renewal of the motion to dismiss and that the plaintiff be nonsuited with prejudice and also a motion that the jury be instructed to bring in a verdict for the defendant and against the plaintiff. Without rehashing the testimony that has gone in so far and with the matters stricken from the complaint by the Court we have only the barrel episode,—

The Court: —I think, at this time, gentlemen, that I will add to the portions eliminated from this complaint, Items 1, 2 and 3, so the only matter [120] now that is left in the complaint is the failure to keep the drum in an upright position. I don't feel that there is any evidence at all that soft surface there had anything to do with the matter as to the failing to provide solid footing. The plaintiff testified that he had solid footing and that he did not slip so that it comes down to the one question as to the negligence of the co-worker in the handling of the barrel.

(Remarks of counsel and Court reported not transcribed.)

The Court: I will deny the motion at this time and the matter will be limited to the handling of the barrel. Other matters have been eliminated

from this case, that will give you an opportunity to shorten your case a good deal. The Court will be in recess at this time until one o'clock.

October 27, 1953, 1:00 p.m.

The Court: Ladies and gentlemen of the jury, I think I should tell you at this time there is only one question in this case now, and that is whether or not one Harry Bogardis negligently handled the barrel of oil in question in failing to keep that barrel or drum of oil in an upright position. All other questions have been eliminated from the evidence that has been introduced before you [121] so far. There will be only one question submitted to you for your decision and that is whether or not the employee of the railroad company, Harry Bogardis, was guilty of negligence in failing to keep the drum or barrel of oil in an upright position. You may call your first witness.

HARRY BOGARDIS

being called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Sharp): Mr. Bogardis, are you an employee of the Milwaukee Railroad?

A. Yes, sir.

Q. And you have been for how long?

A. 31 years.

Q. How much of that time have you worked in the St. Maries roundhouse?

(Testimony of Harry Bogardis.)

A. I have been working there since 1928.

Q. Since '28?

A. Except four years that I was firing on the road.

Q. Were you working there in 1949 and 1950?

A. Yes.

Q. And what is your particular job there? [122]

A. Stationary fireman.

Q. In about 1950 approximately how many men were working on your shift in this roundhouse?

A. I would say four men in 1950.

Q. Was there usually one laborer in that group of four? A. Yes.

Q. What kind of work does a laborer usually do in a small roundhouse like that?

A. Well, clean the pits, clean the engines and any other necessary work around there.

Q. Would it be a fair statement to say that he is an assistant to various men there?

A. Yes.

Q. In a small roundhouse like that do the men pretty well cooperate with each other on duties?

A. Yes, sir.

Q. As I understand it, one of the requirements of the roundhouse like that is that the workmen put up barrels of wash oil, is that right?

A. Yes, sir.

Q. And what does that job entail, that is, to get a barrel of wash oil ready for use?

A. We go and get a truck and then we get the barrel of oil on this truck, there is a hoop on it

(Testimony of Harry Bogardis.)

that we throw over the barrel when we pick the barrel up and then we go and [123] unload it.

Q. By truck do you mean a two-wheeled truck, a hand truck? A. Yes.

Q. The hoop that you mentioned, is that connected with the truck in some way?

A. Yes, connected with the truck, both handles.

Q. Is it a two man or one man job to move this barrel of oil from one place to another?

A. It is a two man job.

Q. How did the two men work together on that job?

A. Well, one man pulled the truck and the other helped usually with the handles or with the rope, that is the way he usually helps.

Q. How far does that barrel have to be moved before it is set up?

A. I should say probably a hundred feet.

Q. Have you put up a lot of those barrels in your time? A. Lots of them.

Q. Did you put up a lot of those barrels before February of 1950? A. Yes, sir.

Q. And are you still putting up those barrels?

A. Yes, sir.

Q. Turning your attention to February of 1950, do you recall an incident of putting up one of those barrels with Mr. Nitey? [124]

A. I wouldn't say the date exactly, it might have been sometime in there about that time.

Q. I am talking about one specific incident now, can you recall or can't you recall any unusual in-

(Testimony of Harry Bogardis.)

eident? A. No, I don't think I can.

Q. Then is your answer that you may or that you may not have put up a barrel in 1950, in February, 1950, with Mr. Nitcy?

A. Well, it could be.

Q. How often do those barrels have to be put up?

A. Well, it just depends on how much we use, it may be two weeks and it may be once a week.

Q. Now, I will ask you again, do you recall any one particular incident around February of 1950 where you put up a barrel with Mr. Nitcy?

A. No, I can't.

Q. Has he worked with you on that job at other times? A. Yes.

Q. Has he worked with you on that job as long as he has been with you?

A. I guess so, yes.

Q. I will ask you if in February of 1950 you can recall any incident when you were wheeling a barrel of oil in and dumped it over on its side?

A. No, I don't. [125]

Q. Ordinarily how does a barrel end up when it is brought in that way?

A. Well, we just tip the truck up and set it up.

Q. You set it up on end, is that right?

A. Yes.

Q. And what about the strap or hoop?

A. We take the strap off after it is set up.

Q. Then turning your attention to February,

(Testimony of Harry Bogardis.)

1950, can you recall when you pushed one on its side or let one drop on the side?

A. No, I don't.

Q. Can you recall any incident, in doing that work, where the barrel ended up on its side?

A. No, I don't, I can't remember.

Q. Can you recall in February of 1950 a situation where a couple of—

Mr. Glasby: —I will object to that on the ground it is leading, all of these questions have been leading, he is trying to suggest the answer.

The Court: He has not finished his question yet, I cannot tell whether it is leading or not. Go ahead.

Q. Can you recall in the year 1950 when you were working with Mr. Nitcy, any special occasion when he complained that he hurt his back? [126]

A. No.

Q. You have already stated that you cannot recall any situation where a barrel ended up on its side, is that right?

A. That is right.

Q. Then I take it that you cannot recall any situation where you had to lift one end and had it half way up and dropped it back on the ground, is that correct?

A. No, sir, I don't recall anything like that.

Q. If an incident had happened in 1950 at which Mr. Nitcy had complained of hurting his back, would you recall that?

A. I would.

Q. You would recall that?

A. I would recall it, yes.

(Testimony of Harry Bogardis.)

Q. And no such incident occurred, is that correct?

A. Not to my knowledge, no, it did not occur.

Q. Can you recall an incident of working with him, putting up a barrel and where he laid off because of a bad back, or his telling you that he had a bad back?

A. No, he didn't tell me that.

Mr. Glasby: We object to that as hearsay.

The Court: He has answered the question.

Q. Did Mr. Nitcy ever complain to you while you were working [127] with him on the job, that he had hurt his back? A. No.

Mr. Glasby: We make the same objection.

The Court: The answer may stand.

Q. Your answer to that question was no?

A. That's right, my answer was no.

Q. When did you first hear about any alleged injury occurring to Mr. Nitcy?

Mr. Glasby: We object to that.

The Court: On what grounds do you base your objection?

Mr. Glasby: On the ground that it is hearsay.

The Court: He is not asking what he heard, he is just asking when he heard it without asking what it was that he heard.

Q. When do you recall that you first heard of any injury to Mr. Nitcy's back in working with you?

A. When I read in the newspaper about the case.

Mr. Sharp: I think the plaintiff may inquire.

Mr. Glasby: I have no inquiries.

FRANK E. MILLER

called as a witness by the defendant, after being first duly sworn testifies as follows: [128]

Direct Examination

Q. (By Mr. Sharp): Dr. Miller, are you a chiropractor? A. Yes.

Q. And where have you practiced?

The Court: Do you admit his qualifications as a chiropractor?

Mr. Glasby: I would like to know a little more about him.

The Court: Very well, go ahead with your examination, I thought I could save a little time.

Q. Where have you practiced as a chiropractor?

A. At St. Maries and at Twin Falls, Idaho.

Q. Is there a license that you have to have to practice your profession?

A. Yes, sir, my license is C-16.

Mr. Sharp: Do you admit his qualifications now, Mr. Glasby?

Mr. Glasby: I will admit his qualifications as a chiropractor.

Q. Dr. Miller, do you know Mr. James Nitcy?

A. Yes, sir.

Q. Have you ever treated Mr. Nitcy?

A. Yes, sir. [129]

Mr. Glasby: I will now object as to the privileged communication.

(Testimony of Frank E. Miller.)

The Court: You object on the ground that he was a doctor who treated Mr. Nitcy and any testimony he would give would be privileged?

Mr. Glasby: Yes, your Honor.

Mr. Sharp: May I argue that question?

The Court: If the plaintiff does not want him to testify I don't think that I can permit him to testify here, but I will allow the jury to step out for a moment and I will hear you.

(Remarks of Court and counsel in the absence of the jury reported but not transcribed.)

The Court: You may call the jury, Mr. Bailiff.

(The following in the presence of the jury.)

The Court: I think it is a well established principle of law that a physician or surgeon cannot, without the consent of his patient, be examined as to any information acquired in attending the patient which was necessary to enable him to prescribe or to act for the patient. However, in this case the plaintiff himself took the witness stand and testified as to certain things that had taken place between this doctor and himself. I am satisfied that by doing so he waived the [130] requirement of this rule, the testimony, however, will be limited to only those matters to which the plaintiff has testified when he was on the stand and nothing more. Any further information that this doctor has which is objected to by the plaintiff would not be admissible here. You may proceed.

Q. Doctor, did Mr. Nitcy consult you for a back condition in 1947? A. He did.

(Testimony of Frank E. Miller.)

Q. Are you recollecting that out of memory or do you have any records that you want to refer to?

A. I have a daily file book and a record card.

Q. And you have consulted those, have you?

A. Yes, sir.

Q. And in addition to your memory you are relying on the records you have?

A. I am relying on my records.

Q. And in 1948 did the plaintiff consult you for a low back pain or condition? A. Yes.

Q. In 1950 did the plaintiff consult you for a low back pain or condition?

A. Yes, sir, that is right.

Mr. Sharp: That is all, Doctor.

Mr. Glasby: I have nothing to ask. [131]

JAMES J. DUPREE

called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Sharp): Dr. Dupree, are you a physician and surgeon, and M.D.?

A. Yes, sir.

The Court: Do you admit the doctor's qualifications?

Mr. Glasby: Yes, I will admit his qualifications as a physician and surgeon.

The Court: I think we all know him.

Mr. Sharp: There are one or two questions I would like to ask the doctor along that line.

(Testimony of James J. Dupree.)

The Court: Very well.

Q. Doctor, what position do you have with the Milwaukee Hospital Association?

A. I am chief surgeon.

Q. What type of patients do you have consulting the Milwaukee Hospital Association generally?

A. They are employees of the railroad company, the Milwaukee Railroad Company, generally, who are members of the hospital association and they are just the general run of patients, did you mean what are the complaints generally? [132]

Q. Yes.

A. Well, everything that is referred to me from Tacoma, Washington, to Mobridge, South Dakota.

Q. Does the medical association take care of employees for just accident cases, industrial accident cases or any general condition?

A. Any general condition, any sickness, any eye condition, dental condition or any medical or surgical problem that comes up, anything regarding any employee, regardless of whether it is an accident or not.

Q. Do you have other doctors working for you or under you? A. Yes.

Q. And are they assigned to districts or how is that handled?

A. We have our territory divided up into districts with a district surgeon and then we have the local surgeon under the district surgeon in each of the districts.

Q. Where is your main headquarters?

(Testimony of James J. Dupree.)

A. At Seattle.

Q. And do you have other doctors there?

A. Yes, sir.

Q. What kind of doctors are they, general practitioners?

A. No, they are generally specialists, surgical consultants, oculists, nose and throat consultants, dentists, orthopedic surgeons, medical specialists, neurological [133] specialists, any one of the specialties that is included in the field of medicine or allied studies.

Q. How does an employee use the Milwaukee Hospital Association?

The Court: I wonder if this is necessary, Mr. Sharp, I thought I eliminated any necessity for this, for the manner of handling this case.

Mr. Sharp: Perhaps that is true, your Honor, I will not go into it.

The Court: There is nothing for the jury to consider in regard to any treatment.

Mr. Sharp: That is right.

Q. Doctor, does your territory cover St. Maries, Idaho? A. Yes, sir.

Q. When an employee comes to work for the railroad, one who is classified as a laborer, is he given a physical examination? A. Not all of them, no.

Q. Why not?

A. Some of the organizations, the labor organization, have an agreement with the railroad that their employees are not given a pre-employment examination.

(Testimony of James J. Dupree.)

Q. Are you familiar, off hand, with whether a laborer at St. Maries would be given an examination prior to employment? [134]

A. No, sir.

Q. Have you ever had the name of James Nitcy appear on any reports? A. Yes, sir.

Q. These reports, where do they come from generally?

A. Well, through my office are cleared all of the reports from the district surgeons, showing the patients who have been treated by them or by any of the local surgeons in the district. All of these reports are sent to us each month in Seattle, through the general surgeon's office, for the purpose of paying bills and medical expenses.

Q. Will you state whether or not Mr. Nitcy's name appeared prior to 1950 on any of your medical reports?

A. Yes, I am quite sure it did.

Q. Doctor, have you yourself ever examined Mr. Nitcy? A. Yes, sir.

Q. In connection with what type of trouble or condition?

A. In 1952, for a back condition.

Q. Did he come to Seattle for that?

A. Yes.

Q. What type of examination did you give him?

A. Well, I examined him myself and I also had Dr. McConnvill, who is an orthopedic specialist, examine him.

Q. Any other doctor examine him? [135]

(Testimony of James J. Dupree.)

A. Well, he was examined by my associate who is an internist or a medical man, and also by the X-ray people in their department, all of the work was done that is generally done when a patient is in a hospital.

Q. Doctor, was this man placed in a hospital?

A. Yes, sir.

Q. And he was examined there? A. Yes.

Q. You stated that you had consulting doctors, did you confer with them?

A. Yes, sir, I did.

Q. And did your findings and those of your consultants agree on this man's diagnosis?

A. Yes, they did.

Q. Would you just tell the court and jury what you found about this man's back condition, in general terms?

A. As a result of our examination in which we considered X-ray and other laboratory tests,—the physical examination which done by myself, Dr. Peterson and Dr. McConnvill, we arrived at a diagnosis of chronic hypertrophic osteo arthritis which is just a description of arthritis, chronic arthritis. Osteo arthritis means that it involves the bone and hypertrophic means an excessive deposits of bone formed around the joints which make them painful.

Q. How does that condition usually occur, Doctor, how does [136] it come about?

A. Arthritis is a disease that occurs in most of us as we grow older, just the same as we lose our

(Testimony of James J. Dupree.)

teeth, we have to wear glasses, our hair turns grey, it is a degenerative disease and I presume that 95 per cent of the people have it in some form or other by the time they reach the age of 40. We don't know the exact causes, it can be caused by many things, such as chronic infection, nutrition as a child. Certain factors in our daily diet, metabolism, the use of the different forms of diets that are defective or deficient in some form, resulting in changes in the bone, in the bone physiology, so that these things occur. We don't know why it hits some people in a worse form or to a greater degree than others and some it passes by altogether.

Q. Does it occur in some people more than in others, say people who do hard physical work more than generally?

A. No, I wouldn't say so. My experience has been that a man who does heavy physical labor can have X-ray evidence of a severe arthritis and still have a minimal amount of complaint, whereas someone who worked as I do,—I work hard, but I don't do manual labor,—can become crippled with arthritis in fact a good many of our doctors are so crippled up that they are unable to [137] follow their profession. I don't think that it picks on any class or group of people at all. It is a disease, a condition that we see as a person becomes older.

Q. How does that show up on an X-ray, I mean how can you see it on an X-ray?

(Testimony of James J. Dupree.)

A. Well, it will show up in the X-ray in two different ways generally, one in which there is an excessive deposit of calcium which casts a shadow when the X-ray is made, it casts a shadow between the joint surfaces. Another form or type of arthritis is one in which the joint faces decreases in size so that the range of motion becomes less than it formerly was, and when that occurs, the ligaments and the soft part that holds the bones together shrinks too and do not allow as much movement and when a movement is made it is painful.

Q. I believe you said that you had X-ray taken of Mr. Nitey's back? A. I did, yes.

Q. Did this condition show up on that X-ray?

A. It did.

Q. Unfortunately we don't have a shadow box but perhaps that light will be enough for you to show the jury.

The Court: These X-rays may be marked and admitted. Perhaps it would be a good idea to have [138] them in evidence before the doctor testifies as to them. They are Exhibits 6 to 9, defendant's exhibits.

A. There are four X-ray films here, the two large X-rays are films of the patient's back made while the patient was lying or standing up straight. They are what we call anterior-posterior position. The X-ray tube would be in front and make such an X-ray from anterior to posterior position. This X-ray shows that view, showing the lower part of the spine, some of the ribs and almost the entire

(Testimony of James J. Dupree.)

pelvis. Each vertebra is a box like bone. You may wonder what this white material is, this white material was apparently injected into the patient's back at a previous time, because we did not do that. These changes that have been talked about and that are seen here are these spurs, this one here (indicating), another spur here, one here, one here and here, there is also a tendency of the formation of one there (indicating). Those would be between one, two, three, four and five of the lumbar vertebra. Now, the other X-ray film is essentially the same view, the reason there are two is because they can be put in a stereopticon box, like the old fashioned stereopticon slide viewer so that you can get a third dimension. They are made just the same as the other except that there is a slight shift in the tube so that when it is put in the viewing box it will give a [139] third dimension.

Q. Something like the 3-D movie, Doctor?

A. Something similar.

Q. Now will you continue with your explanation, or your reading of the film?

A. This middle sized X-ray film is in the lateral position, the X-ray tube is positioned here (indicating) and the plate is positioned in this manner and we call that a lateral X-ray. This X-ray is one showing the lower part of the dorsal back and a few of the upper lumbar vertebra, in other words, where we see ribs attached those are dorsal vertebra and where there are no ribs attached those are lumbar vertebra, or what you refer to as the

(Testimony of James J. Dupree.)

small of your back. Now, in this film again, there is what we are discussing, here is a spur here, and here, there is a spur there, a spur there, and you can see a large spur there (indicating) showing that he has arthritis involving all vertebra as shown in that view. The smallest of these films is what we call a cone lateral view. This distinct circle (indicating), that is done with a cone placed on the X-ray tube. The X-ray is somewhat like a camera, when you take a close up you put a special lense on your camera and you do the same with the X-ray tube, and this is a cone view for the purpose of determining whether or not there [140] was an injury in this spot of the back where the patient complained of the injury. The injury could have been a slippage of the vertebra,—this is the pelvis (indicating), the spine rests on the pelvis and quite often we see that slipped off. In this view there is no displacement whatever, there is a little spur here and here and there is some diffused arthritis in this joint, in this joint, which is known as the lumbar sacro joint.

Q. Doctor, you have been handed another X-ray, I think the testimony shows that was taken on February 14? A. Yes, February 14, 1950.

Q. Can you see any evidence of arthritis there, Doctor?

A. Yes. Unfortunately there are only two vertebra showing on the film but there is definitely a spur here (indicating), the same one that we saw before. Now, if I may have the other film I can

(Testimony of James J. Dupree.)

demonstate that for you. If you can fix in your mind this spur here and one up here (indicating) and now, you can see the spur here almost identical to this, and these films are dated February 6, 1952.

Q. Now, Doctor, you looked at that one dated February of 1950, how long would it take that condition to occur or a condition like that?

A. Do you mean arthritis? [141]

Q. You pointed out some spurs, how long would it take that condition to occur?

A. That is hard to say because these changes start the day that you are born but they don't show up in X-ray except in very unusual cases until a person reaches about the age of 40 and then they may not show up in any changed form for a good many years after that. They may reach the maximum state of development, but to produce spurs of that kind, as indicated on the film, it has taken I would say at least ten years, it has probably taken 10 or 11, maybe more years than that.

Q. At any rate more than four days?

A. Yes.

Mr. Sharp: That is all, Doctor.

Cross Examination

Q. (By Mr. Glasby): Doctor, you have mentioned that disease causes this arthritis?

A. Yes.

Q. Are there any other causes besides disease?

A. I mentioned dietary and nutritional defects, of course, those are forms of disease.

(Testimony of James J. Dupree.)

Q. Is it possible for trauma to aggravate such condition?

A. Well, it is possible for trauma to momentarily, and by [142] momentarily I mean for a period of a few days after a person has received, say an injury such as a fracture in and about one of these places or a dislocation or a severe contusion or a twist, it is possible for those joints to become sore if arthritis is present, but it is also possible for them to become sore if arthritis is not present. If I were to answer your question and state my honest opinion I would say that whatever opinion a doctor or physician may draw would be simply arm chair reasoning, I mean, I have no proof, I could not prove nor could I disprove that twisting or a fracture or an injury of any sort could either aggravate or not aggravate arthritis.

Q. Out of this vast field of people that have arthritis or an arthritic condition, would you even care to venture an appraisalment or an opinion as to the number caused by disease or caused by trauma?

A. I have never seen arthritis caused by trauma.

Q. You have seen it aggravated?

A. I have seen it, where a person would be incapacitated for a few days or weeks by virtue of injury, I would again have to say that I would not be able to state with any definite proof that his disability or his inability to work or his complaint was due to arthritis, that is, an aggravation of his arthritis, or whether they [143] were due to an

(Testimony of James J. Dupree.)

injury that may have occurred. My experience is that wherever a person has arthritis and he has some minor injury that ultimately it gets well enough so that he can go to work and does. On the other hand, people who have progressive disease keep on getting worse and worse until eventually many of them fortunately not a great many, because if it did we would all be crippled, they get so they cannot work at all. They are unable to do that type of work, I mean, labor, that is what I had in mind.

Q. Doctor, is the 11th dorsal shown on the X-ray? A. On my film, yes.

Q. I wonder if you would show me that, please?

A. Yes. We have to identify this as a lateral view, the last vertebra that has a rib attached. This is the last vertebra that has a rib attached to it which means it is the 12th dorsal so the 11th would be just above that, this would be the 11th (indicating).

Q. Do you detect anything unusual about that?

A. Yes. In this instance he has a complete bridging across, which is characteristic here (indicating), the spur here joins up with the 10th.

Q. Is that the only irregularity?

A. Yes, that is the only one I see. [144]

Mr. Glasby: I would like to have this film marked as an exhibit and show it to the witness.

The Court: This is rather irregular, this should have been placed in evidence in your case in chief if you wanted it introduced.

(Testimony of James J. Dupree.)

Mr. Glasby: I will withdraw it.

Mr. Sharp: If they are films of this man's back we would like to see them but I think that you should make your record properly.

Mr. Glasby: I will withdraw them.

I think that is all.

Redirect Examination

Q. (By Mr. Sharp): Mr. Glasby asked you in connection with trauma, and I believe you mentioned in connection with the trauma condition fractures, twists, and contusions, and I believe you said they might cause some aggravation of a pre-existing arthritic condition, did you find any evidence of a contusion, a fracture or a twist in this man's back? A. No, I did not.

Q. And I believe that you stated that you had never seen arthritis caused by trauma?

A. That is right. [145]

Mr. Sharp: I think that's all.

Mr. Glasby: That is all.

Mr. Sharp: I think that all the exhibits are in.

The Court: Yes, I think so, the clerk will check on those.

Mr. Sharp: The defendant rests at this time and we would like to renew the motion made at the end of the plaintiff's case.

The Court: Do you have any rebuttal, Mr. Glasby?

Mr. Glasby: None.

The Court: The jury may be excused at this time for 15 minutes. (In the absence of the jury.)

The Court: The record may show that the motions are renewed. Do you wish to add anything to your motions?

Mr. Sharp: None other than I don't think that Mr. Bogardis showed any kind of negligence on the part of the railroad, he just reiterated what the evidence of the plaintiff had already shown. The plaintiff's evidence shows that this was the customary and usual method of handling this oil barrel, it shows no objection on the part of the plaintiff, no injury at [146] that time that he knew of.

The Court: In view of the rules of Federal procedure that gives the Court further control over this motion I may overrule the motion or deny it and let the jury pass upon this, I have not made up my mind at the moment, but counsel may come into my chambers now and go over the instructions with the Court.

The Court: I will overrule the motion, as I said before the Court has control of this matter and can give it further study. I am going to submit this matter to the jury. I think that 30 minutes on a side should be sufficient, 20 minutes would be better but you may have 30, and you may proceed with your argument.

(Argument of counsel to the jury.)

Instructions of the Court

This action is brought by the plaintiff, James Nitcy, against the defendant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in which

the plaintiff alleges that one Harry Bogardis, an employee of the defendant, was negligent in the handling of a barrel of oil and because of such negligence the plaintiff was injured. The defendant has filed its answer in which it denies this allegation of negligence and alleges that if the plaintiff was injured it was because of his own negligence, and that such negligence was the primary and sole cause of any injury which he may have received.

It becomes my duty as Judge to instruct you as to the law and it is likewise your duty as jurors to follow the law as I shall state it to you, on the other hand, it is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority vested in you is not an arbitrary power but must be exercised with sincere judgment and sound discretion and in accordance with the instructions which I shall give you.

You will disregard any statement made by counsel on either side which is not sustained by the evidence and you will likewise disregard any evidence which may have been offered and not admitted by the Court or any evidence which, after its admission was ordered stricken by the Court. Statements made by counsel either during the trial or in their arguments are not evidence and should not be considered as such. Your verdict must be based upon the evidence, and in arriving at it you should not consider or discuss anything in connection with this case except the evidence received at the trial. It is your duty to weigh the evidence

calmly and dispassionately, to regard the interest of the parties to this action as the interest [148] of strangers, and to decide the issues upon the merits and to arrive at your conclusion without regard to what effect it may have upon the future of the parties to the action.

This case is based upon a statute of the United States generally known as the Federal Employer's Liability Act, which provides that every common carrier by railroad, while engaging in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for any injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.

The Federal Act on which the plaintiff relied for recovery in this case, requires that before the plaintiff can recover he must establish, by a preponderance of the evidence, the negligence alleged in the complaint. This negligence has been limited to only question, and that question is: Was Harry Bogardis negligent in handling the oil drum in question, in failing to keep said drum in upright position? If you find that he was not negligent in this regard, you will go no further in your consideration of this case, and you should find for the defendant.

By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but [149] a greater weight of the evidence. That is what the word preponderance means, evidence which convinces you that the truth lies upon this

side or that, it is that which is more convincing, more persuasive. The burden therefore is upon the plaintiff in this case to show that the defendant was guilty of negligence in the respect charged in the complaint.

Unless you are satisfied from the evidence that (1) the barrel was dumped on its side by the plaintiff's fellow employee and, (2) that the act of dumping the barrel on its side was negligence and, (3) that such negligence caused the injury of which the plaintiff now complains, and, (4) that the method of handling the barrel was on this occasion different from the method ordinarily used, and, (5) that plaintiff complained to his superior that the job was too heavy, and (6) that his superior, notwithstanding this complaint, ordered him to go ahead and lift the barrel, you must find for the defendant.

The defendant's employee, Harry Bogardis, was bound to handle the barrel of oil in question only as a reasonably prudent person would handle it, and the plaintiff must be held to have understood the ordinary work required of a laborer in a railroad roundhouse, to have understood the nature of the physical duties that he would be called upon to perform, and if in this case you find that the [150] plaintiff sustained injuries as he claimed and that these injuries were the result of the ordinary physical work required of a laborer rather than the result of the negligence of Harry Bogardis, the employee of the defendant, then plaintiff is not entitled to recover.

Negligence is the failure to exercise reasonable and ordinary care. By the term reasonable and ordinary care is meant that degree of care that a reasonable and prudent person would exercise under the same or similar circumstances and condition. Negligence consists of the doing of some act which a reasonable and prudent man would not do under the same or similar circumstances or the failure to do something, some act that a reasonably prudent person would do under the same or similar circumstances. Negligence is never presumed but must be established by proof the same as any other fact in the case. By the phrase reasonable care or ordinary care is meant the exercise of that care and caution such as would be exercised by reasonably prudent persons under the existing circumstances. Ordinary care and reasonable care are relative terms and such care is proportionate to and commensurate with the danger involved. In other words, the greater the danger involved the greater is the care required, although there is but one standard of care and that is ordinary or [151] reasonable care as defined in these instructions.

You are instructed that contributory negligence is the failure to observe that degree of care which reasonably and prudent persons usually observe under the same or similar circumstances to protect themselves from injury and which by reason of such failure was the proximate cause of the injury complained of. You are instructed that the defendant can be held liable only for such as constituted

the proximate cause in whole or in part of the injuries complained of.

In order for the plaintiff to recover it must be proved to your satisfaction by a fair preponderance of the evidence that the defendant's negligence was the proximate cause, in whole or in part, of the injuries complained of.

There can be no recovery for disabilities existing before the accident. Therefore no recovery can be had for the effects of any disability which were not the natural or probable consequence of defendant's negligence. The question always is: Was there an unbroken connection between the wrongful act, if any, and the injury. In no event can damages be allowed except such as resulted directly from the negligence of the defendant. Damages produced by other agencies, before or after the accident, are not before you for consideration and you should not consider them in arriving at your verdict.

Proximate cause of an injury is that which in the natural and continuous sequence, unbroken by any new and independent cause produces an injury and without which the injury would not have occurred.

Industrial enterprise entails for all those engaged in it, certain physical exertions which no amount of care on the part of the employer can avoid. In applying the above principles to this case, in order to recover, plaintiff is required to prove by a preponderance of the evidence that the defendant was guilty of negligence which in whole or in part proximately caused the accident which plaintiff

complains of, and the injuries or damages resulting therefrom. If you find from a preponderance of the evidence, that the physical exertion, if any, to which the plaintiff was subjected and which caused his injuries, if any, could not have been avoided by the defendant in the exercise of reasonable care, then the plaintiff is not entitled to recover against the defendant.

You are instructed that the law recognizes in the ordinary affairs of life that accidents sometimes occur, which are, under all the circumstances not directly [153] and proximately attributed to the fault or neglect on the part of anyone, and are thus unavoidable. If any person be injured or sustain damages as a result of such unavoidable accident the law does not permit any recovery by the person so injured or damaged.

You are instructed that if after a full and deliberate consideration of the evidence, you believe that the accident complained of was an accident which, under all of the circumstances, was unavoidable, then there can be no recovery in this action.

You are instructed that the defendant was not the insurer of the plaintiff's safety. The plaintiff is not entitled to recover just because he was or may have been injured in the course of his employment. There is no presumption from the fact that the injury may have occurred, that it was caused by the negligence of the defendant. Before the plaintiff would be entitled to recover anything in this action he must prove by a preponderance of the evidence that the defendant was negligent

and that such negligence was the proximate cause, in whole or in part, of his alleged injury.

You are instructed that a person is never relieved from exercising ordinary care for his own safety, and cannot cast the burden of such care upon another. Therefore, if you find that the plaintiff [154] was aware that he had a weakened back condition and had been treating or treated for such condition prior to February 10, 1950, and that notwithstanding such condition he continued in his employment as a laborer, for the defendant, and performed the usual physical laboring tasks assigned to him by the defendant, without complaint, and particularly, if you find that the plaintiff knew of his back condition before February 10, 1950, and failed to complain of the task assigned to him on February 10, 1950, but instead performed the tasks, you should find that the defendant was not negligent in assigning him these tasks on these occasions.

If you are satisfied from the evidence in this case that any witness herein has wilfully testified falsely to any material fact or statement in this case you are at liberty to disregard his or her entire testimony except where you find that it is corroborated by reliable and truthful evidence.

If you find from a preponderance of all of the evidence in this case that the defendant was negligent and that its negligence was the proximate cause of the alleged injury to the plaintiff then the defendant is liable in damages although the defendant's negligence was not the sole ap-

proximate cause of the alleged injury to the plaintiff. If you further find that the plaintiff [155] was guilty of contributory negligence, this fact shall not be a total bar to recovery, but the damages may be diminished by you in proportion to the amount of negligence attributable to the plaintiff.

If you find that the plaintiff is entitled to recover you must award him such damages as you feel would compensate him for the loss proved to have been sustained by the plaintiff and proximately caused in whole or in part by the defendant's negligence, as alleged in plaintiff's complaint, and in estimating the amount of such damages you will consider the nature, expense and severity of plaintiff's injury, if any, the loss of wages and the loss of future earnings, and the impairment of earning capacity, if any, his loss of power and capacity to work, if any, and the effect upon his future, if any, insofar as caused by the injury or injuries proven. If your verdict is for the plaintiff, you should fully and fairly compensate him for all loss and damage approximately caused, in whole or in part, by the defendant's negligence. If after deliberating on this matter you determine that the plaintiff is entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount by each stating an amount that you think should be allowed and then [156] adding the several amounts and dividing the total by 12 or by any number taking part in such method, this

would be a quotient verdict and you should not, under your oath, arrive at such a verdict.

The fact that the court has instructed you upon the measure of damages is not to be taken by you as any indication on the part of the Court that it believes or does not believe that the plaintiff is entitled to recover damages. This instruction is given to you solely as a guide to you in arriving at your verdict only in the event that you find from the evidence and from the instructions given you by the Court that the plaintiff is entitled to recover. If you find from the evidence and the instructions of the Court that the plaintiff should not recover then you will disregard entirely the instructions that have been given you concerning the measure of damage.

The plaintiff and defendant come into court as equals and you should treat them as such. The fact that one of the parties is a corporation and the other an individual should make no difference to you and you will, in your deliberation, not allow any sympathy, prejudice or passion to sway you in the least. They have no place in the trial of a law suit, and you should arrive at your verdict from the evidence submitted to you from [157] the witness stand and the instructions given you by the Court.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire to deliberate you will elect one of your number as foreman and when you have agreed upon a verdict your foreman alone will sign the verdict. Forms of ver-

dicts have been prepared for your use and you will have no trouble in using the verdict which correctly reflects your finding. You will see that one form contains a blank space in which you will insert the amount of damages you allow in the event you find for the plaintiff. If you find for the defendant another form has been prepared in which there is no blank space and in this event you will use the verdict without the blank space. When you arrive at a verdict it will be returned into open court. It will be necessary to ask you to retire from the courtroom for a moment as I have a matter concerning the law which I must take up with counsel. You will be recalled in just a moment or two.

(The following in the absence of the jury.)

The Court: Does the plaintiff want to register any exceptions to the instructions of the Court?

Mr. Glasby: Yes, the plaintiff excepts to the instruction given by the Court on the necessity [158] of the complaint as it was given,—as was stated in citing the Montana case,—I take exception to the giving of that instruction.

The Court: Does the defendant have any exceptions?

Mr. Sharp: The defendant has no exceptions to the instructions given.

The Court: The bailiff may be sworn.

The Court: You may recall the jury. Mrs. Rief, the alternate juror, you may be excused until 10:00 o'clock tomorrow morning, and the jury will now retire to consider its verdict. [159]

[Endorsed]: Filed July 2, 1954.

[Endorsed]: No. 14421. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Appellant, vs. James A. Nitcy, Appellee. James A. Nitcy, Appellant, vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Idaho, Northern Division.

Filed: July 8, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14421

JAMES A. NITCY, Plaintiff-Appellee,
vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAIROAD COMPANY, a corpora-
tion, Defendant-Appellant.

STATEMENT OF POINTS ON APPEAL

Comes Now the Appellant above named, and hereby sets forth the Points on which it intends to rely on appeal:

1. The Court erred in denying Defendant's Motion for a Directed Verdict made at the close of Plaintiff's case and made at the close of all of the evidence, because Plaintiff's evidence was insufficient in law.

2. The Court erred in denying Defendant's Motion for Judgment in accordance with its Motion for Directed Verdict, because Plaintiff's evidence was insufficient in law.

3. The Court erred in refusing to grant Defendant's Motions as above set forth, because the evidence failed to show that Plaintiff received any injuries as alleged in his Complaint.

4. The Court erred in refusing to grant Defendant's Motions above set forth because the evidence failed to show any negligence on the part of the

Defendant but did show that the alleged injury, if it did occur, was caused solely by the negligence of Plaintiff himself.

5. The Court erred in attempting to order a New Trial without setting forth the grounds thereof in its order, and therefore said order for New Trial is ineffective and invalid and the original Judgment entered is still in effect.

6. The Court erred in refusing to set aside the Verdict of the jury and the Judgment entered thereon because said verdict and Judgment entered thereon are contrary to the clear weight of the evidence and represent a miscarriage of justice.

Dated this 17th day of July, 1954.

B. E. LUTTERMAN,

CHAS. F. HANSON,

/s/ MORELL E. SHARP,

Attorneys for Defendant-Appellant

Certificate of Service attached.

[Endorsed]: Filed July 19, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL
(Cross-Appeal)

Now comes the Cross-Appellant, James A. Nitey, and sets forth the points on which he intends to rely on appeal.

1. The Court erred in ordering a new trial on Plaintiff's first count.

2. The Court erred in failing to overrule Defendants' motion for new trial on Plaintiff's first count but should have ordered a new trial for the damages incurred on the counts in Plaintiff's complaint which were withdrawn from the consideration of the jury, and should have allowed the judgment to stand as to Plaintiff's first count.

3. The Court erred in considering Defendants motion for judgment N.O.V. or directed verdict or new trial for the reason that such motion did not specify purported errors.

Dated this 22nd day of July, 1954.

/s/ ROBT. V. GLASBY,

Attorney for Plaintiff-Appellee and
Cross-Appellant

Acknowledgment of Service attached.

AFFIDAVIT AND MOTION

State of Idaho,

County of Kootenai—ss.

Robert V. Glasby, being first duly sworn, deposes and says:

I. That he is Attorney for Plaintiff-Cross-Appellant in this action.

II. That due to the indigence of Plaintiff-Cross-Appellant, he was unable to obtain a transcript of the proceedings and therefore affiant was unable to

quote the ruling of the court in totidem verbis regarding the striking of all counts in Plaintiff's complaint but the first count which was stated as error in Plaintiff-Cross Appellant's "Statement of Points."

Wherefore, Plaintiff-Cross-Appellant prays that this honorable Court permit an amendment of his "Statement of Points" when he has an opportunity to inspect a transcript to state more fully his specification of error regarding the striking of counts in his complaint.

/s/ ROBT. V. GLASBY

Subscribed and sworn to before me this 22nd day of July, 1954.

[Seal] /s/ HAROLD S. PURDY,
Notary Public for State of Idaho. Residing at
Coeur d'Alene, Idaho.

[Endorsed]: Filed July 24, 1954. Paul P. O'Brien,
Clerk.

